91-1272

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
October Term, 1992

LYNN MARTIN, Secretary of the U.S. Department of Labor,
Respondents,

v.

ANDREW A. LEVY and WILLIAM RANDOLPH WHEELER,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether a permanent injunction enjoining Petitioners from violating any provision of the Employee Retirement Income Security Act of 1974 ("ERISA") and a second permanent injunction enjoining Petitioners from ever again providing services to any employee benefit plan governed by ERISA can be granted on summary judgment without a hearing?

II. Even if such injunctions can be granted on summary judgment without a hearing, can such injunctions be granted without the consideration of any evidence tending to prove likelihood of repetition of unlawful conduct?

III. Even if such injunctions can be granted on summary judgment without a hearing, can such injunctions be granted without consideration of any evidence with respect to, or any consideration by the Trial Court of, the traditional equitable factors historically considered in granting or denying injunctions?

IV. Whether the grant of an injunction which amounts to a lifetime bar from participating in the pension industry without a hearing violates the due process clause of the Fifth Amendment to the United States Constitution?

PARTIES—Harold Beck; Paul H. Nielsen; Ken Bryant; A.J. Morales; Peter Prevas; Guy Chadbourne; Florin Dente; John Hayes; James N. Haverfield, individually and on behalf of all others similarly situated; PETER MCGUIRE, on behalf of themselves and all others similarly situated, *Plaintiffs*. Walter Levering; Allen C. Scott; Robert Lowen; Lloyd M. Martin; Francis L. Kyser; Robert Murphy, Esq.; James R. Hammer; Edmund Davis; Franklin K. Riley; Anthony Naccarato; Michael Swayne; Carmina J. Bracco; Henry Nereaux; Edward Morgan; David Boyle; Richard Evans; Allen Taylor; W. Brobst; MM & P Individual Retirement Plan; MM & P Pension Plan, *Defendants*. Tower Asset Management Inc.; Tower Capitol Corporation; Tower Securities, Inc., and Samuel Kovnat, *Defendants-Appellants*. Andrew Cullen; George Bomareto, *Plaintiffs-Appellees*.

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LYNN MARTIN, Secretary of the U.S. Department of Labor,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Andrew A. Levy and William Randolph Wheeler respectfully pray that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is set forth at pages 42a to 49a of the Appendix to this Petition. The District Court Judgment granting an injunction barring Petitioners, among others, from violating ERISA in the future and barring Petitioners, among others, from ever again providing services to any employee benefit plan governed by ERISA is reproduced at pages 39a to 41a of the Appendix. The District Court issued no opinion or findings of fact in connection with its decision, which was made on summary judgment with no oral argument.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 22, 1991. The present petition was filed within 90 days of October 22, 1991. This petition is timely in accordance with the rules of this Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this petition are the Fifth Amendment to the United States Constitution and Rules 52 and 65 of the Federal Rules of Civil Procedure ("F.R.Civ. P."). The pertinent texts of these provisions are reproduced in the Appendix at 49a through 51a.

STATEMENT OF THE CASE

The District Court issued an injunction on motion for summary judgment of the U.S. Department of Labor ("DOL") without a hearing, without oral argument, without making findings of fact and without an opinion, barring Petitioners (i) from prospective violation of ERISA and (ii) from ever again providing services to an employee benefit plan. The District Court based its decision solely upon collateral estoppel from its prior deter-

mination in another case,[1] *itself decided on summary judgment*, that Petitioners had violated ERISA, without receiving any evidence of likelihood of repetition of proscribed conduct or considering the traditional equitable factors. The District Court had jurisdiction pursuant to 29 U.S.C. § 1132(e)(i).

It is submitted that in issuing the injunctions not only did the District Court deprive Petitioners of a significant liberty and property interest without a hearing, it also in effect imposed a quasi-criminal penalty on Petitioners without a trial, in direct violation of a line of cases of this Court. In light of this substantial departure from accepted standards of due process, this Court should grant the Petition to review the important interests involved and establish appropriate safeguards to protect them. Only two Circuits, the Second and the Ninth, have ever permitted this type of injunction on summary judgment, and guidance from this Court is required to resolve this split in the Circuits. This Court has not reviewed the statutory injunction issues raised since the early 1950's, and never in the context of the United States Labor or Securities Laws.

On April 14, 1983, the Individual Retirement Account Plan ("IRAP") of the International Organization of Masters, Mates & Pilots ("IOMM&P)" employed Tower Asset Management, Inc. ("Tower Asset"), an SEC-registered investment advisor, as an investment manager, as defined in ERISA, with respect to $15 million of its assets. Tower Asset was owned by Tower Capital Corporation ("Tower Capital"). Tower Capital Corporation was owned 50% by Samuel A. Kovnat, 25% by Peti-

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1. *Lowen et al. v. Tower Asset Management, Inc. et al.*, 653 F. Supp. 1542 (S.D.N.Y. 1987), *aff'd* 829 F.2d 1209 (2d Cir. 1987).

tioner William Randolph Wheeler and 25% by Petitioner Andrew A. Levy. Kovnat, Wheeler and Levy were the sole officers of Tower Asset. Tower Securities, Inc., ("Tower Securities") an NASD-registered broker/dealer, is owned by the same persons in the same percentages. In 1984 an additional approximately $9 million of funds of the IRAP were assigned to management by Tower Asset and approximately $6.5 million of the Pension Plan of the IOMM&P was also assigned to management by Tower Asset (the IRAP and the Pension Plan collectively, the "Plans").

Kovnat and Capt. Robert Lowen, President of the IOMM&P and Chairman of the Trustees of the Plans, had known each other before Tower Asset undertook to manage funds of the Plans. Levy and Wheeler, who had business dealings since 1976, met Kovnat in late 1982. Kovnat convinced Levy and Wheeler to form Tower Asset with him and to make a bid for the business of the management of funds of the IOMM&P Plans. He informed Messrs. Levy and Wheeler that with his connection to Capt. Lowen, the Trustees of the Plans would approve the relationship. He advised Levy and Wheeler that a presentation should be made to invest the funds in stocks and bonds. In a meeting with Capt. Lowen prior to the engagement of Tower Asset, Capt. Lowen stated to Levy and Wheeler that the principal of the funds under management should be invested in stocks and bonds and the interest could be invested in venture capital. Unbeknownst to Levy and Wheeler, and possibly even to Kovnat, Capt. Lowen apparently had an ulterior agenda of employing assets of the Plans to purchase maritime assets which could generate employment for merchant seamen, who were IOMM&P union members.

After the portfolio was initially invested in stocks and bonds, Capt. Lowen soon began urging that Tower Asset

invest Plan funds in various vessels. Tower Asset made 6 or 7 investments in the maritime industry. In addition Kovnat, mostly over the objections of Levy and Wheeler, made investments in numerous other venture capital situations.

Both the vessels and the venture capital situations called for time and overhead to be expended by Tower Asset and its parent corporation, Tower Capital, and its sister corporation, Tower Securities, which were well in excess of what could reasonably be compensated by the standard ½ of 1% fee for managing a conventional portfolio, the fee to which Tower Asset had stipulated in its management agreement with the Plans. Tower Asset began charging fees to the companies into which Plan funds were invested to cover these substantial expenditures of time and third party expenses. All of the fees were heavily documented, especially since seven of the investments involved public companies.

Ultimately the Management Trustees of the Plans became aware of the maritime investments and the fees to Tower Asset and demanded that Tower Asset be fired. Under severe pressure from the Management Trustees, the Union Trustees relented and the Trustees fired Tower Asset. The Plans commenced suit against the Tower companies and their three principals in the Southern District of New York to recover the fees that the Tower companies received from the companies into which Plan funds were invested and to seek restitution for claimed losses in certain of the investments.

During the first several months after the suit was filed, Tower and its principals turned over thousands of documents to counsel for the Plans and submitted to numerous days of depositions. Tower itself took no

discovery. In February, 1986 the Plans moved for partial summary judgment against the Tower defendants, which was granted against the Tower defendants for the amount of the fees, totaling $1,000,087. Tower's defenses that it (i) relied upon permission from the Trustees to make the investments and charge the fees and (ii) that in each instance legal counsel reviewed the arrangements, was rejected by the District Judge, who held that the receipt of the fees were *per se* violations of ERISA.

In March, 1987 the DOL filed an action against the Tower defendants, the Trustees of the Plans and others, based upon the same cause of action as the suit of the Plans. In addition, the DOL sought an injunction enjoining the Tower defendants from prospective violation of ERISA and barring them from providing services in the pension industry. In November, 1990 the DOL, having never sought preliminary relief, sought to obtain its injunction on summary judgment. The Tower defendants defended the summary judgment motion on the grounds that so much time had passed since the violations (approximately 6 years) that there was no likelihood of repetition, that they were no longer in any business involving pension plans, again indicating no likelihood of repetition, and offered a substantial amount of proof involving the traditional equitable factors, such as reliance on advice of counsel, availability of less drastic yet adequate remedies, adverse impact on the defendants' business reputations which outweighed any potential gain to the government, and assured the court that past violations would not be repeated. The District Court, per Broderick, J. granted the injunctions to the DOL without a hearing (which had been requested by the Tower defendants), without an opinion

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2. *Lowen et al v. Tower Asset Management, Inc. et al., supra.*

or findings of fact and without oral argument. This grant of the two-prong injunction was affirmed by the United States Court of Appeals for the Second Circuit in October, 1991.

REASONS FOR GRANTING THE PETITION

A. A PERMANENT INJUNCTION CANNOT BE GRANTED ON SUMMARY JUDGMENT WITHOUT A HEARING.

F.R. Civ. P. 52 requires the court to find facts specially and state separately its conclusions of law; however, Rule 52 by its terms does not apply to a decision of a motion for summary judgment. However, F.R. Civ. P. 52(a) requires

> "In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."

The only possible reconciliation of these two clauses of Rule 52 is that a permanent injunction cannot be granted on summary judgment. It would be preposterous to think that the draftsmen of the Federal Rules would require findings of fact and conclusions of law for a preliminary injunction but would not so require them for granting the much more serious permanent injunction on summary judgment.

Similarly F.R.Civ.P. 65 requires a hearing for the grant of a preliminary injunction and this Court has interpreted that provision to require a hearing where evidence can be presented by both parties. *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 432, n.7, 94 S.Ct.

1113, 1121, n.7 (1974). ("The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition"). Thus, if a hearing is required for the grant of a preliminary permanent injunction, *a fortiori* a hearing is required for the more serious permanent injunction. In fact, Petitioners, and apparently attorneys for the DOL, can find only two other cases in which a permanent injunction of this nature was granted on summary judgment.[3]

B. EVEN IF A PERMANENT STATUTORY INJUNCTION CAN BE GRANTED ON SUMMARY JUDGMENT WITHOUT A HEARING SUCH AN INJUNCTION CANNOT BE GRANTED WITHOUT THE SUBMISSION OF CONVINCING EVIDENCE TENDING TO PROVE LIKELIHOOD OF REPETITION OF UNLAWFUL CONDUCT.

In *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587 (1944) this Court interpreted § 205 of the Emergency Price Control Act of 1942 ("EPCA") in connection with an attempt by the Emergency Price Control Administrator to obtain an injunction against a proved violator of the EPCA to enjoin future violations. Section 205 of the EPCA read in relevant part as follows:

> "...upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or proctices [violative of the EPCA] a permanent or temporary injunction...shall be granted without bond."

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3. *See SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980) *and SEC v. Research Automation Corp.*, 585 F.2d 31 (2d Cir. 1978).

Given the absolute statutory language the question before this Court was whether the court below had any discretion in granting or denying an injunction once past violations of the EPCA were established. In holding that even in the fact of such absolute statutory language the court did have such discretion, this Court stated:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history....The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs... We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." 321 U.S. at 329-30, 64 S.Ct. at 592.

It should be noted that ERISA contains none of the absolute language of the aforecited section of the EPCA or even of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*[4] The civil enforcement section of ERISA, 29 U.S.C. § 1132(a), on the other hand, provides as follows:

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4. 15 U.S.C. § 77t(b) provides: "Whenever it shall appear to the Commission that any person is engaged or is about to engage in any acts or practices which constitute or will constitute a violation... it may in its discretion, bring an action in any district court of the United States... to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction...shall be granted without bond."

> "A civil action may be brought - ... (5) ... by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to address such violation or (ii) to enforce any provision of this subchapter;"[5]

In *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894 (1953), another statutory injunction case [Clayton Act], this Court reaffirmed its reasoning in *Hecht v. Bowles, supra*:

> "But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurring violation, something more than the mere possibility which serves to keep the case alive.... To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations. 345 U.S. at 633, 73 S.Ct. at 898.

The Second Circuit itself, writing through Chief Judge Kaufman, in a case in which the SEC sought an injunction against a company and several of its officers based upon past violations of the securities laws, explained:

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5. The legislative history of ERISA likewise is devoid of the type of mandatory or even suggestive language found in the EPCA or the Securities Act of 1933 with respect to injunctions based upon past statutory violations. *See e.g.* Senate Rept. 93-127, reported at 1974 U.S. Code Cong. and Adm. News 4838, 4882: "These sections provide that when the Secretary has reason to believe that a pension, profit-sharing retirement plan, or other employee benefit plan is violating the Act or the plan's governing documents, he may seek relief in the federal courts to compel the return of assets to the fund, to require payments to be made, to require the removal of a fiduciary, and to obtain other appropriate relief."

> "It is well settled that the Commission cannot obtain relief without positive proof of a reasonable likelihood that past wrongdoing will recur."[6]

Judge Kaufman further elaborated the standards for granting an injunction to an agency of the government as follows:

> "This court noted in *Management Dynamics*, that '[i]llegal activity, without more, does not automatically justify the issuance of an injunction.' 515 F.2d at 807. The SEC must show a 'cognizable risk of future violation, something' 'more than the mere possibility which serves to keep the case alive' '*Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 405 (2d Clr.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 947, 39 L.Ed. 2d 38 (1973) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1301 (1953))."'[7]

Similarly in *SEC v. American Board of Trade, Inc.*, 751 F.2d 529 (2d Cir. 1984) Judge Friendly wrote:

> "The district judge abused her discretion in finding [based solely on past violations] a cognizable danger that, unless enjoined, ABT would revert to the peccadillos involved in the TB program." 751 F.2d at 538.

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6. *SEC v. Bausch & Lomb, Inc.* 565 F.2d 8, 18 (2d Cir. 1977).

7. 565 F.2d at 18.

The Second Circuit in this case has strayed very far from these teachings.[8]

In the past the Second Circuit itself has viewed the amount of time which has elapsed since the violations of a statute as a key element in the determination of likelihood of repetition. In this case the acts found violative of ERISA took place between October, 1983 and October, 1985. The DOL filed its suit in March, 1987 and did not move for either a temporary restraining order or a preliminary injunction or expedited relief. From November, 1985, to the present, none of the Tower defendants have engaged as service providers to ERISA covered plans [A230]. The DOL did not move for injunctive relief until December, 1990, more than five years after the last of the proscribed acts occurred, and the injunction was not granted until June, 1991, approximately six years after the last of the proscribed acts took place.

In *SEC v. Monarch Fund*, 608 F.2d, 938 (2d Cir. 1979) the Second Circuit addressed the issue of passage of time:

> "Here, even if a violation of Section 10(b) and Rule 10(b)-5 had been shown - and it was not - we do not believe that an injunction was appropriate. The judgment below was not entered until more than seven years after the alleged violations. On oral argument, the SEC conceded that at no time during these seven years did it attempt to expedite the requested injunc-

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8. See also *SEC v. Caterinicchia*, 613 F.2d 104 (5th Cir. 1980) ("In requiring the EC to establish that defendants presented a 'continuing menace to the public', the court placed no greater burden on the SEC than the statute requires, particularly in view of the developing judicial attitude toward a closer appellate scrutiny of the issuance of the injunctions."

tive relief. Nor was there any evidence that the defendants committed any prior or subsequent violations of the securities laws.'"[9]

The District Court and the Second Circuit should have considered the six year lapse of time without subsequent activity, let alone violations, as strong evidence that there was no likelihood of repetition of proscribed conduct. This the District Court and the Second Circuit did not do.

C. A PERMANENT STATUTORY INJUNCTION CANNOT BE GRANTED WITHOUT SUBMISSION OF EVIDENCE WITH RESPECT TO, AND CONSIDERATION BY THE TRIAL COURT OF, THE TRADITIONAL EQUITABLE FACTORS CONSIDERED HISTORICALLY IN GRANTING OR DENYING INJUNCTIONS.

In deciding whether to grant statutory injunctive relief, the court must assess all those considerations of fairness that have been the traditional concerns of equity courts. *Hecht v. Bowles, supra*, 321 U.S. at 329-330, 64 S.Ct. at 591-92. See also *Aaron v. SEC*, 446 U.S. 680, 701, 100 S.Ct. 1945, 1958 (1980). *Hecht v. Bowles* held that the traditional equitable analysis is still pertinent in the statutory contest. Relying on *Hecht v. Bowles*, courts have found the following factors particularly relevant:

1. "Good faith reliance on advice of counsel", *SEC v. Harwyn Industries Corp.*, 326 F.Supp. 943, 956 (S.D.N.Y. 1971);

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9. *SEC v. Monarch Fund*, 608 F.2d 938, 943 (2d Cir. 1979).

2. Whether or not a less drastic or less intrusive remedy is available to satisfy the concerns of enforcement, *Hecht v. Bowles, supra, SEC v. American Board of Trade, supra* p. 538 ("We have no doubt that if the SEC had proposed an 'undertaking',...rather than a permanent injunction with its mainfold collateral consequences, ABT would have accepted -").

3. Harmful impact on defendant's professional reputation and legitimate business activities, *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1102 (2d Cir. 1972). *See also* the excellent article, *Andre, Consequences of SEC Injunctions*, 1981 U.Ill. L.Rev. 625, citing numerous cases in which the severe collateral consequences to the defendant outweighed the public good that could possibly be achieved.

4. "An important factor in this regard [likelihood of future violation] is the degree of intentional wrongdoing evident in a defendant's past conduct". *Aaron v. SEC, supra*, 446 U.S. at 701, 100 Sup.Ct. at 1958.

5. "The sincerity of defendant's assurances against future violations", *SEC v. Universal Major Industries*, 546 F.2d 1044, 1048 (2d. Cir. 1976), *cert. denied* 434 U.S. 834 (1977).

As demonstrated by the numerous documents attached to the Affidavit of Andrew J. Levander, Esq. sworn to December 20, 1990 ("Levander Affidavit") [A216-337], evidence relevant to each of these factors - evidence that clearly mitigates in favor of Petitioners - exists and should have been heard by the District Court. The District Court refused to consider any

evidence except evidence of past violations, which in itself was carried over from another case by collateral estoppel.

In particular, as demonstrated by the Levander Affidavit and the numerous other affidavits and documents attached thereto, including portions of prospectuses and other documents filed with the SEC, had it considered such evidence the District Court would have found that in connection with each of the violations of ERISA, respected counsel had reviewed or been involved in the activities and had not adversely commented. Thus, in over twenty transactions where violations of ERISA were deemed to have occurred, at least one major law firm was involved in all of the details of each such transaction.

Similarly the District Court should have heard evidence that Petitioners were not the major decision makers of Tower Asset, and that in numerous instances Petitioners attempted to prevent some of the transactions deemed violative of ERISA. Again Petitioners presented affidavits and other documents going to these points but the District Court would not consider such evidence. Likewise the District Judge, and the Second Circuit panel, refused to consider the severe collateral impact of the injunctions upon the careers of Petitioners, who up to this point have had unblemished records, Levy being a graduate of Harvard Law School and Wheeler being a graduate of Harvard Business School, ignoring completely the teachings of Judge Friendly in *SEC v. American Board of Trade, Inc., supra* 751 F.2d at 535-36 where he wrote:

"We think it appropriate to begin our discussion by

> emphasizing the gravity of an injunction against violations of the securities laws.... even a more narrowly drawn injunction against defendants who are in the securities business would have serious collateral consequences.... Fully appreciating the role played by SEC injunctions in the enforcement of the securities laws, as we have done for decades, we nevertheless agree with the statement of the Chief Justice concurring in *Aaron v. SEC* [citation omitted] that at least when defendants are active in the securities field '[a]n injunction is a drastic remedy, not a mild prophylactic...'"

In *American Board of Trade supra*, Judge Friendly cites favorably the *Andre* article,*supra*, which assembles numerous cases and authorities documenting the collateral harm that can inure to a defendant from permanent statutory injunctions. For instance, as noted in the article, former SEC Commissioner Wheat has stated that an SEC injunction "strikes a devastating blow at a lawyer's most precious possession -his reputation", *Wheat, The Impact of SEC Professional Responsibility Standards*, 34 Bus. Law. 969, 969 (1979) [Levy is a practicing lawyer [A230]]. The article also notes that, due to disclosure requirements, such an injunction would in essence ban the person so enjoined from any involvement with public corporations.

The Tower defendants proposed, and the DOL rejected, a less drastic but wholly adequate remedy, an undertaking whereby the Tower defendants would give the DOL at least thirty days' prior written notice before offering to provide or before agreeing to provide services of any nature to an employee benefit plan. [A220] The District Court did not even consider whether such a remedy would be adequate. See *SEC v. American Board of Trade, Inc.*,

supra, 751 F.2d at 535, rejecting any such blanket injunctions against violations of entire federal acts.

The District Court also ignored evidence of the immense amount of work performed by Petitioners in return for the fees found violative of ERISA. The Affidavit of Julio Gianotti, a naval architect and former professor at the U.S. Naval Academy, sworn to February 22, 1988, attached as Exhibit 3 to the Levander Affidavit [A239-240] details some of this work:

> "Mr. Levy worked extremely hard on the Venus Venturer project, overseeing the work on the vessel, arranging financing and essentially running the project. Mr. Levy was also actively involved in attempting to raise the capital and structure the financing for the SS Monterey and the M/V Galveston projects [without IOMM&P Plan money]. It is my opinion that Tower earned whatever fees they were paid for this extensive work. ... in all my dealings with the Tower people, and with Capt. Lowen, it was obvious to me that Capt. Lowen was well informed about all aspects of Tower's activities with respect to these projects on behalf of the MMP...."

The District Court should have considered this diligent work as a mitigating factor.

Similarly, Petitioners introduced evidence that there was no intentional wrongdoing, *viz.* they believed they were helping Capt. Lowen reconstitute the United States Merchant Marine, they attempted to direct a large portion of the portfolio to blue chip stocks but were rebuffed by those in control [A347], they made full disclosure of their activities in many documents filed with the SEC [A272-289, 293-319, 325-329]. They disseminated

documents detailing the transactions to the Trustees of the Plans and Plan Administrator [A272-275] and drafted legal memorandums detailing the ERISA consequences of their various actions and placed them in the files [A214-215]. The District Court did not consider any of this evidence going to lack of intentional wrongdoing which itself indicates no likelihood of repetition of proscribed conduct. *Aaron v. SEC*, 446 U.S. at 701, 100 S.Ct. at 1958.

The District Judge issued a lifetime bar against participation by Petitioners in the pension industry. It should be noted that even persons convicted of crimes involving the management of pension assets can be suspended from employment in the pension industry for no more than thirteen years.[10]

Even *SEC v. Murphy*, and *SEC v. Research Automation Corp., supra* p.8, n.3, considered the traditional equitable factors and likelihood of repetition. Thus, the DOL's request for summary imposition of such an overbroad injunction is patently unjustified particularly in light of the equitable considerations discussed above, which the District Court refused to even consider.

D. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT A HEARING BE HELD BEFORE AN INDIVIDUAL CAN BE BARRED FROM EMPLOYMENT IN AN INDUSTRY.

This Court has held that hearing is required before a court can revoke an individual's right to practice law, *In re Ruffalo*, 390 U.S. 544, 550-51, 88 S.Ct. 1222, 1226 (1968)

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10. ERISA Section 411(a), 29 U.S.C. §1111(a).

(disbarment is an "adversary proceeding of a quasi-criminal nature" - hearing required). This Court has also held that a hearing is required before an organization can be placed on the Attorney General's subversive list, because its members would be barred from government employment, "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury...." (hearing required), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, 71 S.Ct. 624, 655 (1951) [Jackson, J. concurring]. Even in the process of regulating eligibility for, let alone removal from, a type of prefessional employment, a range of opportunities cannot be foreclosed "in a manner...that contravene[s] ... Due Process", *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238, 77 S.Ct. 752, 756 (1957) and, specifically, in a manner that denies the right to a full prior hearing, *Willner v. Committee on Character*, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180 (1963). The legal theory developed and enunciated in these cases is that an individual develops a property right in a line of activity, which cannot be terminated except by due process and specifically only with a full prior hearing.

In fact the Second Circuit in *Huntley v. Community School Board*, 543 F.2d, 979, 984-86 (2d Cir. 1976) found that the deprivation of the likelihood of finding future employment as a supervisor implicated a property right when a school principal was dismissed. This deprivation, coupled with concurrent damage to his professional reputation by the dismissal, entitled him to a full prior hearing before public announcement of charges which might impair his chances of future employment as a public school supervisor (even though he was subsequently able to find employment as a teacher).

This Court has held that a full prior hearing is required whenever a state or the federal government seeks to affect a significant property right. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972) (In light of apparent *de facto* tenure policy college is required to grant a hearing before terminating a professor even though his contract had expired), *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 222 (1973) (denial of renewal of liquor license - hearing required), *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1070) (due process hearing required before welfare benefits can be terminated) and *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971) (driver's license of uninsured motorist involved in accident suspended before liability determined for accident. Due process requires hearing to determine whether there was reasonable possibility of judgment being rendered against him.).

While the significance of a property interest may depend on whose ox is being gored, it is submitted that an injunction against violating a broad statutory scheme and an injunction prohibiting Petitioners from engaging for their entire lifetime in any manner in the pension industry is a deprivation of a property right and a liberty interest which at least rises to the significance of the rights upheld in the aforecited cases. The severity of the deprivation of Petitioners' rights is increased by the fact that the injunction strikes a near fatal blow at Petitioners' integrity, honesty and reputations. In fact, disclosure requirements of the securities laws increase Petitioners' deprivation by in effect barring them from employment as officers or directors or significant shareholders of public corporations. "For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and a opportunity to be heard are essential.' *Wisconsin v. Constantineau*, 400 U.S. 433, 437", *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2706 (1971).

In *Board of Regents v. Roth supra*, this Court, in holding that a state, in declining to rehire a teacher whose contract had expired was not depriving the teacher of any significant property or liberty interest, stated:

> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case."

Given the prohibition of future employment in the pension industry and the immense stigma attached to the injunctions in the case at bar, there is no doubt that this is "a different case", far stronger than the companion case (to *Roth*) of *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972), in which a hearing was required by this Court even though the respondent college professor's contract had already terminated when he was denied future employment, this Court holding that the potential *de facto* tneure policy of the college needed to be explored at a hearing.

Petitioners have been foreclosed from the possibility of employment in the pension industry by the injunctions, and quite probably from employment in connection with public corporations due to the disclosure obligations of the securities laws and damage to their reputations. Thus as stated by Judge Friendly in his important article *Some Kind of Hearing*, 123 U.Pa. L.Rev. 1267, 1297 (1975):

> "Another category ranking high in the procedural scale is the revocation of a license to practice

a profession. Here the government is threatening to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely."

Here, as in the above-cited cases where a District Court seeks to deprive persons of significant property and liberty rights, that deprivation requires, at a minimum, a full hearing with the right to call witnesses and cross examine opposing witnesses. *Green v. McElroy*, 360 U.S. 474, 497, 79 S.Ct. 1400, 1414 (1959) (Security clearance of an employee of defense contractor cannot be revoked without hearing and right to cross examine witnesses agsinst him). If this Court requires so much of federal agencies, it certainly cannot hold its District Courts to a lesser standard.

CONCLUSION

It is respectfully submitted that Petitioners' Petition For Certiorari and the issues raised herein should be addressed by the Justices of this Court.

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Robert J. LOWEN, et al., Plaintiffs,

v.

TOWER ASSET MANAGEMENT, INC., et al., Defendants.

No. 85 Civ. 9545 (VLB).

United States District Court, S.D. New York.

Feb. 25, 1987.

Trustees of two pension plans move for partial summary judgment on two counts of amended complaint alleging violation of prohibited transaction provisions of Employee Retirement Income Security Act. The District Court, Vincent L. Broderick, J., held that: (1) investment banking corporation and registered broker dealer, as well as investment manager, were fiduciaries within meaning of Act; (2) basis for piercing corporate veil and holding individual defendants personally liable existed; (3) defendants violated ERISA provisions prohibiting fiduciary from dealing with assets of plan in his own interest and from receiving any consideration for his own personal account from any party dealing with plan in connection with transaction involving assets of plan; and (4) plaintiffs were entitled to restitution to plains of all profits and all forms of consideration received by defendant in violation of ERISA.

Order accordingly.

1. Pensions 44

"Fiduciary" as used in Employee Retirement Income Security Act is to be literally interpreted to effect statute's remedial purpose. Employee Retirement Income Security Act of 1974, § 3(21)(A), 29 U.C.A. § 1002(21)(A).

2. Pensions 44

Investment banking corporation an registered broker-dealer, as well as investment manager, were "fiduciaries" under Employee Retirement Income Security Act where investment banking corporation and registered broker-dealer used pension plan funds as basis for their investment banking agreement, banking corporation openly discussed investment manager's management of plans, all three entities were owned and controlled by same individuals, and equity interest of banking corporation and registered broker dealer in companies in which plans invested gave them indirect control of plan assets. Employee Retirement Income Seecurity Act of 1974, § 3(21)(A), 2 U.S.C.A. § 1002(21)(A).

3. Corporations 1.6(4)

Although no explicit Employee Retirment Income Security Act provisions pertain to piercing corporate veil, remedial thrust of ERISA is not to be frustrated by meticulous emphasis on corporate form Employee Retirement Income Security Act of 1974, § et seq., 29 U.S.C.A. § 1001 et seq.

4. Corporations 1.61(10)

Base for piercing corporate veil of investment management corporation, investment banking corporation, and registered broker dealer to hold individual officer and shareholders personally liable for breach of fiduciary duty under Employee Retirement Income Security Act was established; employees of corporate defendant performed services for all three entities simultaneously, without particular regard forms of consideration received by defendant in violation of ERISA.

Order accordingly.

1. Pensions 44

"Fiduciary" as used in Employee Retirement Income Security Act is to be liberally interpreted to effect statute's remedial purpose. Employee Retirement Income Security Act of 1974, § 3(21)(A), 29 U.S.C.A. § 1002(21)(A).

2. Pensions 44

Investment banking corporation and registered broker-dealer, as well as investment manager, were "fiduciaries" under Employee Retirement Income Security Act, where investment banking corporation and registered broker-dealer used pension plan funds as basis for their investment banking agreement, banking corporation openly discussed investment manager's management of plans, all three entities were owned and controlled by same individuals, and equity interest of banking corporation and registered broker dealer in companies in which plans invested gave them indirect control of plan assets. Employee Retirement Income Security Act of 1974, § 3(21)(A), 29 U.S.C.A. § 1002(21)(A).

3. Corporations 1.6(4)

Although no explicit Employee Retirement Income Security Act provisions pertain to piercing corporate veil, remedial thrust of ERISA is not to be frustrated by meticulous emphasis on corporate form. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

4. Corporations 1.6(10)

Base for piercing corporate veil of investment management corporation, investment banking corporation, and registered broker dealer to hold individual officers and shareholders personally liable for breach of fiduciary duty under Employee Retirement Income Security Act was established; employees of corporate defendants

performed services for all three entities simultaneously, without particular regard for which entity paid salaries, and corporate defendants had virtually zero net worth. Employee Retirement Security Income Act of 1974, §§ 406, 406(b), (b)(1, 3), 29 U.S.C.A. §§ 1106, 1106(b), (b)(1, 3).

5. Pensions 43

Investment manager, investment banking corporation, and registered broker dealer, together with their officers and shareholders, violated provision of Employee Retirement Income Security Act prohibiting fiduciary from dealing with assets of plan in his own interest where officers and directors caused pension plan to invest in companies in which officer and directors had equity interest, investment manager agreed to provide consulting services to a corporation at same time it had agreed to invest pension plan funds in that corporation. Employee Retirement Income Security Act of 1974, § 406(b)(1), 29 U.S.C.A. § 1106(b)(1).

6. Pensions 43, 46

Investment manager, investment banking corporation, registered broker dealer, and their officers and shareholders, acted in concert and in violation of provision of Employee Retirement Income Security Act prohibiting fiduciary from receiving consideration for its own personal account from any party dealing with pension plan in connection with transaction involving assets of plan, where investment manager received consulting fee from corporation in which it was investing plan assets, broker dealer received $25,000 fee from corporation for investment banking services, and banking corporation obtained $25,000 investment banking fee from a corporation contingent upon pension plans, purchase of $300,000 debenture from that corporation. Employee Retirement Income Security Act of 1974, § 406(b)(3), 29 U.S.C.A. § 1106(b)(3).

7. Pensions 46

Acts otherwise prohibited by Employee Retirement Income Security Act are not exempted under provision of act authorizing reasonable compensation. Employee Retirement Income Security Act of 1974, §§ 406(b)(2), 29 U.S.C.A. §§ 1106(b), 1108(b)(2).

8. Pensions 46

Provision of Employee Retirement Income Security Act which authorizes fiduciary to receive reasonable compensation for services rendered pertains to compensation for services to plan and provides no exemption with respect to compensation from any party dealing with plan in connection with transaction involving assets of plan. Employee Retirement Income Security Act of 1974, §§ 406(b)(3), 408(c)(2), 29 U..C.A. §§ 1106(b)(3), 1108(c)(2).

9. Pensions 49

Trustee's consent to prohibited transaction would not absolve fiduciary responsible from liability under prohitited acts provision of Employee Retirement Income Security Act; consent itself would be violation of ERISA. Employee Retirement Income Security Act of 1974, § 406, 29 U.S.C.A. § 1106.

10. Pensions 49

Violation by investment manager, investment banking corporation, registered broker dealer, and their officers and stockholders, of prohibited transactions provision of Employee Retirement Income Section of all profits and other forms of consideration received by defendants in violation of ERISA, and full extent of plans' investment losses in companies from which deendants received fees. Employee Retirement Income Security Act of 1974, §§ 406 409(a), 29 U.S.C.A. §§ 1106, 1109(a).

Bettina B. Plevan, Proskauer Rose Goetz & Mendelsohn, Seham Klein & Zelman, Burton M. Epstein, c/o Steinberg & Tugendrajch, P.C., New York City, for plaintiffs.

Daniel Kornstein, Kornstein, Veisz & Wexler, New York City, Samuel Kovnat, N. Stonington, Conn., for defendants.

MEMORANDUM

VINCENT L. BRODERICK, Districe Judge.

I.

The plaintiffs, trustees of two pension plans, moved for partial summary judgment on counts two and three of their second amended complaint, which allege violations of the prohibited transaction provisions of the Employee Retirement Income Security Act ("ERISA"), § 406(b)(1) and (3), 29 U.S.C. § 1106(b)(1) and (3). They seek entry of judgment pursuant to Fed.R.Civ.P. 54(b) against defendants for restitution of all profits and other forms of consideration (i.e., $1,087,787 in fees as well as equity interests) received in violation of ERISA § 406. In addition, plaintiffs argue that they are entitled to damages for all losses (an alleged $28,336,720) from investments involving prohibited transactions, in an amount to be determined at a hearing.

The court has considered the pleadings, depositions, and exhibits on file and has considered all facts, documents, and arguments presented by the parties. On November 19, 1986 the court also heard oral argument on plaintiffs' motion. There being no genuine issues as to any material fact. I granted plaintiffs' motion and ruled that plaintiffs were entitled to judgment as a matter of law with respect to their second and third causes of action.

This memorandum supplements the oral disposition of plaintiffs' motion.

II.

The plaintiffs are trustees of the Masters Mates and Pilots Pension Plan ("Pension Plan") and Individual Retirement Account Plan ("IRAP") (collectively referred to as "the Plans"), and bring this suit on behalf of over 3000 participants in the Plans.

The corporate defendants are Tower Asset Management Corp. ("Asset"), the investment mangaer to the Plans; its parent corporation, Tower Capital Corp. ("Capital") which is an investment banking corporation; and an affiliate of Asset, Tower Securities, Inc. ("Securities"), which is a NASD/SEC registered broker-dealer.

The individual defendants, Andrew A. Levy ("Levy"), Samuel Kovnat ("Kovnat"), and W. Randolph Wheeler ("Wheeler") are officers, directors, and stockholders of the defendant corporations.[1] The three corporate defendants are each owned by 50% by defendant Kovnat and 25% each by defendants Levy and Wheeler.

Defendant Asset became an investment manager to the IRAP on April 14, 1983. In the initial investment agreement $15 million of IRAP assets were assigned to Asset for management.[2] Asset became the investment manager to the Pension Plan on November 9, 1984 and was given a total of approximately $6.5 million of Pension Plan assets to manage. The Plans terminated Asset as their investment manager by letter dated November 4, 1985.

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1. Walter Levering is named as a defendant in plaintiffs' second amended complaint; however, plaintiffs have not sought summary judgment against him.

2. Plaintiffs have alleged that a total of $24 million of IRAP assets was assigned to Asset for management. While there is no documentation of the additional $9 million of assigned assets, an analysis of investments by the Plans' custodian supports the alleged $24 million assignment.

The agreements between Asset and the Plan assets under its control, subject to the standards set forth in ERISA, and in the agreements between the Plans and Asset. During its period as investment manager Asset purchased securities in several companies on behalf of the Plans.[3] These transactions are documented in reports of the Plans' custodian ("Marine Midland Reports").

The few employees of the corporate defendants performed services for the three corporate entities simultaneously, at offices shared by them. Bank records document numerous transfers of funds among the defendant corporations and from the corporations to the individual defendants.

Securities and Capital, in their capacities as broker/dealer and investment banker respectively, entered into agreements with many of the companies in which Plan assets were invested, often concurrently with or shortly before Asset acted on behalf of the Plans. The services Securities and Capital agreed to provide to these companies primarily entailed assistance with captalization, in the form of public offerings and private placement of debentures, in return for which these defendants were to receive commissions, fees, and other forms of consideration, including shares of stock.[4] The corporate defendants received fees and commissions totaling $1,087,787 or stock ownership interests, or both, from at least twenty-six companies in which Plan assets were invested. The next section of this memorandum sets forth the fees obtained by the corporate defendants and the contemporaneous nature of the transactions undertaken by the various defendants.

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3. A summary of Assets' investments made on behalf of the Plans reveals that as of February 28, 1986 the Plans had shares of twenty-nine companies.

4. In many of these transactions Securities served as the broker/dealer for Capital.

III.

Receipt of Cash Payments
Rolfite (and Combustion Catalyst)

By agreements dated August 5 and August 16, 1983 defendant Securities was retained by the Folfite Company ("Rolfite") to provide various investment banking services, in return for which it was to receive a $25,000 retainer fee, fees of 5% of the amounts raised through private placements on behalf of the company, warrants to purchase Rolfite common stock and other consideration. Pursuant to these agreements, Rolfite issued to Securities a "retainer" check dated August 15, 1983 in the amount of $25,000.

On August 16, 1983 Asset purchased, on behalf of IRAP, subordinated debentures of Rolfite in the principal amount of $200,00; additional subordinated debentures were purchased on October 28 and December 2, 1983 for $225,000. Securities received from Rolfite an additional $18,750 in investment banking fees between October and December 30, 1983.

By agreement dated November 1, 1984, defendant Asset contracted to purchase shares of Rolfite preferred stock on behalf of IRAP. By this same agreement, Rolfite undertook to pay Asset a flat retainer of aid Rolfite in its financial planning and related activities. The retainer was to be paid, however, only for so long as IRAP owned any of the stock purchased pursuant to the agreement. The Marine Midland Reports show that Asset in fact acquired, on behalf of the IRAP, 50,000 shares of preferred stock of Rolfite in 1984 for $500,000 and 33,333.33 shares in the first quarter of 1985 for $250,000, in addition to common stock, warrants and promissory notes. Capital received a retainer of $10,000 from Rolfite in March, 1985.

One of the primary services rendered on behalf of Rolfite was the securing of financing "for the benefit of

the company involving a research and development tax shelter partnership investment vehicle called Combustion Catalyst Partnership." Defendant Kovnat's deposition, Tr. 197-98. In connection with this financing, Capital received investment banking fees totalling $136,000.

Best Brands

By Memorandum of Understanding dated August 23, 1983 Securities contracted with Best Brands, Inc. ("Best Brands") to "immediately attempt" to raise $400,000 in capital and to provide related investment banking services, in return for which it was to receive 700,000 shares of stock and a $50,000 investment banking fee. According to defendant Levy, it was "intended" that this money would be raised by investing IRAP funds. Defendant Levy's deposition, Tr. 114-15. Asset purchased subordinated debentures of Best Brands on behalf of IRAP in August and October 1983. Capital received from Best Brands $25,000 in fees for services rendered. Levy deposition, Tr. 116-17. In addition, Capital received a $5,000 check from Best Brands dated July 9, 1985 for consulting services.

KCR

By agreements dated October 23, 1984 and April 2, 1985 Capital agreed with KCR Technology, Inc. ("KCR") to sell newly issued shares of KCR common stock and to provide related investment banking services, in return for which it was to receive a cash fee of $50,000 and other consideration.

In late 1984 and early 1985, Asset purchased, on behalf of the Plans, common stock of KCR at an aggregate cost of $150,000.

Fees totalling $10,000 were received from KCR by Capital in September, 1985, and defendant Levy has

testified that the remaining $40,000 of its fee is a receivable from KCR. Levy deposition, Tr. 123.

National Satellits

By agreement dated June 22, 1984 Capital agreed with National Satellite Entertainment Network Corp. ("National Satellite") to raise up to $1,000,000 in 14½% debentures due June 22, 1987 and to provide investment banking services, in return for a $50,000 advance retainer and a fee of $5,000 per month, beginning in July, 1984.

A subordinated debenture dated June 22, 1984, bearing interest at 14½% and due June 22, 1987, was purchased by Asset on behalf of IRAp for $500,000, and another debenture was purchased later in 1984 for $250,000.

Pursuant to its investment banking agreement Capital received from National Satellite $50,000 in investment banking fees, additional fees totalling $35,000, and 111.76 million shares of the company's common stock that it still holds.[5]

American Davey

By agreement dated March 30, 1984 Capital agreed to effect as soon as possible, on behalf of American Davey Corporation ("American Davey"), a two-stage private placement of securities valued in excess of $1 million, in return for a 5% commission on all funds raised and monthly fees of $2,000 (once $350,000 was raised), and $5,000 (once an additional $700,000 was raised).

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5. Plaintiffs have submitted listings of the present equity holdings by the defendants. As defendants have not contested these equity interests I assume that they do in fact exist for purposes of summary judgment.

Thereafter, Asset purchased from American Davey, on behalf of IRAp, promissory notes and subordinated debentures at an aggregate cost of $700,000.

Capital received from American Davey an investment banking fee of $17,500.00.

Double Eagle Lines

According to the Minutes of the Initial Meeting of Directors of Double Eagle Lines, Inc. ("Double Eagle") on October 10, 1984, Double Eagle resolved to borrow $300,000 from IRAP through the issuance of debentures in that amount, and to pay Capital an initial investment bnaking fee of $25,000, "upon the funding of the aforementioned debenture."

Asset in fact purchased on behalf of IRAp a subordinated debenture of Double Eagle dated October 25, 1984 at a cost of $300,000, and in conjunction with this transaction Capital received a $25,000 investment banking fee.

OAO

Capital and OAO Corporation ("OAO") observed the terms of an unsigned investment banking agreement dated October 11, 1984, under which Capital agreed to raise capital and to provide related services for a fee. In 1984 over $500,000 of IRAp funds were invested in OAO. Capital received a $30,000 fee from OAO's principal, Cecile D. Barker.

Polycell

A letter dated July 6, 1984 from defendant Levy to one Eugene Schuster describes a transaction whereby Asset would purchase for IRAP a $125,000 promissory note of Polycell, Inc. and at the same time Capital was to receive $10,000 in consulting fees, and 20,000 shares in

stock upon payment of $200. This transaction was carried out in substantial part; in 1984 IRAP acquired a $125,000 note of Polycell, and Capital acquired Polycell stock and received $3,333.33 in fees.

Filmtel/Super-K

By an agreement dated January 25, 1984 Capital undertook to arrange private placements and to provide related investment banking services on behalf of Filmtel, Inc. (which later was merged with Super-K Entertainment) ("Filmtel/Super-K"), in return for a $25,000 retainer fee and other consideration. Asset in 1984 purchased, on behalf of IRAP, a subordinated debenture of Filmtel in the principal amount of $250,000.

Capital received from FIlmtel/super-K investment banking fees totalling approximately $50,000, of which $25,000 is documented by Capital's bank records.

BTI

By agreement dated April 12, 1984 Capital agreed to raise capital and provide related investment banking services for BTI Corporation ("BTI") in return for a 5% commission on all capital raised and a retainer of $5,000 per month, with the first three months payable in advance. Asset purchased, on behalf of the Plans, subordinated debentures in the principal amount of $225,000 on April 13, 1984, and Capital on April 18, 1984 received $25,000 in management fees from BTI.

Ultra Magnetics

By agreement entered into on July 25, 1983, Ultra Magnetics Technology, Inc. ("Ultra Magnetics") authorized Securities, in return for fees and equity interests, to sell on its behalf a secured debenture in the

amount of $250,000, with an option for Securities to place additional debentures up to $250,000. As contemplated by this agreement, Asset purchased subordinated debentures of Ultra Magnetics in a total amount of $500,000 on behalf of the Plans. Pursuant to the agreemetn Capital received a $10,000 placement fee from Ultra Magnetics.

Falconhead (and General American)

On June 1, 1984 Capital agreed with Falconhead Development Corp. ("Falconhead"), a company created by Asset with IRAP funds and operated and controlled by Asset on behalf of IRAP, that Capital would receive a monthly fee of $15,000, in return for serving as manager of properties owned by Falconhead.

Defendants received from Falconhead a $10,000 retainer, and an additional $50,000 designated as "loans".

Capital also received $10,000 in fees on February 1, 1985 from General American Properties Corp. ("General American") which, in a transaction implemented by defendants, borrowed $500,000 from Falconhead.

Pan Ocean Navigation

By agreement dated June 1, 1984 Capital agreed with Pan Ocean Navigation, Inc., a company created by Asset with IRAP funds and operated and controlled by Capital on behalf of IRAP, to manage the repair, conversion and refurbishment of the MS Scandinavian Sea, in return for a fee of $15,000 per month. Between May and November, 1985 Capital received from Pan Ocean consulting fees, supervision fees, management fees, and wire transfers totaling $183,205, which were paid out of a Pan Ocean account controlled by Capital.

AHL

By agreement dated November 14, 1984, American Heavylift Shipping Company ("AHL"), a company in which Plans funds were invested, agreed to employ Capital as a financial consultant for the period commencing December 1, 1984 and continuing for two years thereafter, and to pay Capital a minimum retainer of $8,000 per month. Pursuant to this agreement, Capital received five monthly $8,000 retainers from AHL.

Rainbow Navigation

Capitol received fees of $15,000 on April 20, 1984 and $182,000 on December 6, 1984 from Rainbow Navigation, Inc. ("Rainbow"), a company to which IRAP lent $300,000 and in which IRAP had at least a 15% stock interest.

By virtue of the transactions entered into by the corporate defendants Capital and Securities with Rolfite, Combustion Catalyst, Best Brands, KCR, National Satellite, American Davey, Double Eagle, OAO, Polycell, Filmtel/Super-K, BTI, Ultra Magnetics, Falconhead, General American, Pan Ocean, AHL, and Rainbow, the defendants contracted to receive cash fees in excess of $1 million. Asset or Capital in fact received from these companies at least $940,788 in cash payments.

Defendants also received cash payments totalling $146,999 from various entities in which Plan assets were invested: Dataset Communications, Inc. ("Dataset"), Quazon Corp. ("Quazon/Gammon Group"), Laser-Med International, Inc. ("Laser-Med"), Night Vision Corp. ("Night Vision"), P.C. Electrial Corp. ("P.C."), Seap-Bridge Express, Inc. ("Sea-Bridge"), Seatron Corp. ("Seatron"), Technical Management, Inc. ("TMI"), and Venus Cruise Lines, Inc. ("Venus").

IV.

Acquisition of Equity Interest

In connection with the investment of Plan assets in various corporations, the corporate defendants acquired equity interests in various of those corporations, for nominal payments or at discounted notes. Thus defendants Capital and Securities acquired stock or related equity interests in American Davey, Commercial Cargo Spacelines, Inc., Dataset, Filmtel, Quazon/Gammon Group (affiliated with Q.C. Leasing), Golf Technology, Inc. KCR, National Satellite, Night Vision, OAO Corp., and Rolfite, for nominal payments or at discounted rates. These defendants still hold 375,000 shares of common stock of Commercial Cargo Spacelines, Inc. 33 shares of common stock of Dataset, 750 shares of common stock of the Quazon-Gammon Group, 100,000 of common stock of Golf Technology, Inc., 2,500,000 shares of restricted common stock and an additional 200,000 shares of common stock of Night Vision Corp., and 55 shares of common stock of OAO.

Defendants' Prior Equity Interests

Substantial Plan assets were invested in companies in which the individual and corporate defendants already had a substantial ownership interest. For example, Seatron and TMI were substantially or wholly owned or controlled by one or more of the defendants before, and apart from, the Plan investments. These interests are detailed below:

Seatron: Levy and Wheeler had substantial stock interests. During the period when Plan funds were invested, Seatron completed the acquisition of shares of G.R. Associates, in which Kovnat's wife had a substantial ownership interest.

TMI: Kovnat was founder, chairman and a substantial shareholder. Following the investment of Plan assets, TMI acquired the stock of Buckeye Petroleum Company, Inc., which was owned and controlled in substantial part by defendants Levy and Wheeler.

V.

This court derives jurisdiction over this action from section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1). An action brought by fiduciaries is authorized by section 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3). The Penstion Plan is a defined benefit plan within the meaning of Section ³(35) of ERISA¢, 29 U.S.C. § 1002(35). IRAP is an individual account or defined contribution plan, within the meaning of Section 3(34) of ERISA, 29 U.S.C. § 1002(34).

The plaintiffs' § 406 claims are based on the following arguments: (1) the defendants were *all* fiduciaries within the meaning of ERISA; (2) defendants received fees and other forms of consideration from companies in which Plan assets were invested ursuant to agreements entered into at or about the time of the investments: and (3) defendants invested Plan assets in companies in which they had, or were soon to have, ownership interests.

The defendants have argued that § 406 only imposes liability on fiduciaries as defined under ERISA, and that the defendants, with the exception of Asset, are not fiduciaries under the Act. As such, the defendants state that plaintiffs' motion should be denied because the fees plaintiffs have challenged were: (1) not received by a "fiduciary" as required for liability under 4o6(b); (2) not received "in connection with the investment of assets of the plan," as required under 406(b); (3) reasonable compensation for services rendered and therefore exempt under § 408(b); and (4) consented to by the plaintiffs, thereby making them proper and estopping plaintiffs'

challenge to them.

While the plaintiffs' central claim is that defendants engaged in prohibited transactions as described in § 406(b), a threshold matter that must be determined is whether or not the defendants were fiduciaries under ERISA. The term "fiduciary" is defined under ERISA as follows:

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises *any* discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or *indirect*, with respect to any moneys or other property of such plan, or has *any* authority or responsiblity to do so, or (iii) he has *any* discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A)(emphasis added).

Plaintiffs set out three alternative grounds for holding all of the defendants liable as fiduciaries for both restitution and damages. Specifically, they contend that all of the defendants should be held liable because: (1) they are fiduciaries; (2) they conspired with a fiduciary to enter into prohibited transactions; or (3) their commingling of operations warrants the disregarding of any separate identity.

[1] The term "fiduciary" is to be liberally interpreted to effect the statute's remedial purpose, and the courts have "taken a broad view in deciding whether a particular service provider should be considered a fiduciary under ERISA." *Brindk v. DaLesio, 496 F.Supp 1350, 1375 (D.Md.1980) aff'd in part and rev'd in part, 667 F.2d 420*

(4th Cir.1982); see also Kroll & Tauber, Fiduciary Responsiblity and Prohibited Transactions under ERISA, 14 Real Property, Probate and Trust Journal, 657, 660 (1979). As the court noted in *Eaton v. D'Amato*, 581 F.Supp. 743, 746(D.D.C.1980), "[a]pplying a restrictive judicial gloss to the term 'fiduciary' itself would, in effect, enable trustees to transfer important responsibilities to a largely immunized 'administrative' entity. A clear congressional desire to expand the scope of fiduciary standards of conduct should not be so undermined."

Congress' intent to give broad scope to the term "fiduciary" is clearly set out in the legislative history of ERISA:

> The term 'fiduciary' ... includes persons to whom 'discretionary' duties have been delegated by named fiduciaries. While the ordinary functions of consultants and advisors to employee benefit plans ... may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisors may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

1974 U.S.Code Cong. & Admin.News 5103.

The plaintiffs have argued that the individual and corporate defendants, with the exception of Levering, were fiduciaries within the meaning of ERISA because "they had authority and control over investments" and were therefore obligated to observe the fiduciary standards of conduct established by the Act.

A. *The Corporate Defendants*

The defendants do not dispute Asset's status as a fiduciary, but argue that it is the "only person or entity among the defendants that rendered any investment advice to the plans ... pursuant to its investment management agreement with the plans." There is, they assert, no evidence tending to suggest that "Capital and Securities 'controlled' Asset, which in turn had authority over the investment of Plan assets."

While the evidence supports defendants' position that only Asset (and not Securities or Capital) rendered investment advice, the defendants have failed to counter plaintiff's evidence that defendants exercised discretionary authority and control over the management or disposition of the Plans' assets, thus rendering applicable 29 U.S.C. § 1002(21)(A)(i) and (iii), *supra*.

The nature and extent of the "control" required under § 1002(21)(A) is treated in 29 C.F.R. § 2510.3-21(e)(2), which provides: "[f]or purposes of this paragraph the term 'control' means the power to exercise a controlling influence over the management or policies of a person other than an individual."

[2] Although Asset was the entity engaged to make investment decisions regarding Plans' assets, defendants Capital and Securities used the Plans' funds as a basis for their investment banking agreements. Capital in at least one agreement with a corporation in which Plan funds were invested openly discussed Asset's management of the Plans. Furthermore, there is evidence of Capital's and Securities' authority and control with respect to the management and disposition of Plan assets. Thus in one instance, where IRAP purchased through Asset a $[illegible]5,000 promissory note of Polycell, Inc., Capital directed the details of the closing, making sure that Polycell signed and delivered all the necessary documents.

The equity interests of Capital and Securities in companies in which the Plans invested gave Capital and

Securities indirect control over the Plans' assets. This indirect control is even referred to be defendants in certain of their investment banking agreements.

Furthermore, all the corporate defendants were owned and controlled by the same individuals. Through those individuals the corporate defendants acted on each other's behalf and in concert with one another. Through this concert of action the corporate defendants exercised actual discretionary control over the Plans' assets.

Defendants Capital and Securities acted as fiduciaries under ERISA and should be subject to its fiduciary standards. Unlike Asset, Capital and Securities are not named fiduciaries and are therefore, fiduciaries only to the extent that they performed one or more of the functions described in section 29 U.S.C. § 1002(21)(A). *See also* 29 C.F.R. § 2509.75-8, FR-16Q("The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan").

The corporate defendants' various acts were sufficient to constitute all of them fiduciaries as that term is defined under ERISA § 1002(21)(A).

B. *The Individual Defendants*

[3] "One question that is not resolved by ERISA is whether officers or directors of a corporation that is itself a fiduciary can be classified as fiduciaries on an individual basis.... The evidence is conflicting on this point." Little & Thraikill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND.L.REV. 1, 7 (1977). Although there are no explicit ERISA provisions pertaining to piercing the corporate veil, the remedial thrust of ERISA is not to be frustrated by meticulous emphasis upon corporate form. The First Circuit has quite recently dealt with the issue of piercing the corporate veil in an ERISA context:

> ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of indistrial relations generally. Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so, and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent.

Alman v. Danin, 801 F.2d 1, 3-4 (1st Cir. 1986) (*citations omitted*).

Most of the decisions which address the personal liability of officers, directors and shareholders under ERISA do not involve the officers and shareholders of corporate fiduciaries. They concern questions of withdrawal liability from multiemployer plans, or, as did *Alman*, failure to make contributions as called for in collective bargaining agreements.

Judge Sweet of this court recently spoke to the issue of whether shareholders or officers can be held personally liable under ERISA in *Trustees of the UIU Health and Welfare Fund and UIU Pension Trust v. New York Flame Proofing Co., Inc., et al,* 649 F.Supp. 843 (S.D.N.Y.1986). In that case, the trustees of a pension fund brought an action to collect allegedly delinquent contributions owed by two corporations under a collective bargaining agreement against the corporations and their president and sole shareholder. The trustees' complaint alleged that the individual defendant was the control person of the defendant corporations and therefore liable as

an "employer" under 29 U.S.C. § 1002(5). The individual defendant moved for summary judgment on the grounds that he never acted outside his capacity as president of the corporations, that he never transacted personal business through the corporate structures, commingled personal and corporate funds or assumed personal liability for any corporate debts. In granting the individual defendant's motion. Judge Sweet said:

> There is a presumption that the corporation is a separate entity from the shareholders or officers and thus only a corporation is generally liable for violations of ERISA. The question of whether the corporate veil insulates Belmont against liability under ERISA is a question of federal substantive law, though state law may be used as a reference guide. Some of the factors which should be considered are 'the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited on the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators ...' Since there is no indication that the corporations were created with an intent to defraud or that their assets would be insufficient to satisfy a judgment, the Union Funds e not provided any basis for establishing the personal liability of Belmont.

New York Flame Proofing, 649 F.Supp. at 847-48 (*citations omitted*).

A similar approach has been taken by other courts, which have found in withdrawal liability or delinquent contribution situations that the traditional factors necessary to pierce the corporate veil must be present in order to impose individual liability under ERISA. *See Alman v. Danin*, 801 F.2d 1 (st Cir.1986); *Connors v. P & M Coal COmpany*, 801 F.2d 1873(D.C.Cir. 1986);

Solomon v. Klein, 770 F.2d 352,354 (3rd Cir.1985).[6]

There is no definitive test under federal law to determine when the corporate form should be pierced. *Alman v Danin*, 801 F.2d at 3. As the court in *Brunswick Corp. v. Waxman*, 459 F.Supp. 1222, 1229 (E.D.N.Y.1978), *aff'd* 599 F.2d 34 (2d Cir. 1979), said: "[t]he circumstances under which the court should disregard the corporate fiction are not always clear and it is difficult, if not impossible, to formulate a precise and categorical definition applicable to all situations."

Criteria have been identified which are applicable in determining whether or not the corporate veil should be pierced:

> In New York, several criteria are paramount in determining whether to pierce a corporate veil: 1) the

---

6. Thus, in *Alman v. Danin*, for example, a union brought an action under ERISA seeking enforcement of a union contrac which called for a corporation to make weekly contributions to various union-operated employment benefit plans. In establishing individual liability in *Alman*, the lower court focused on factors traditionally regarded when questions involve piercing the corporate veil. Specifically, the district court (as reported by the court of appeals) looked at three factors: "the small respect paid by the shareholders themselves to Mohawk's separate corporate identity; the fraudulent intent of the incorporators; and the degree of injustice that would be visited on the litigants by recognizing the corporate identity." 801 F.2d 1, 4 (1st Cir.1986).

7. While there is no "litmus Test" in the federal courts governing when to disregard corporate form, the First Circuit has said:

> The general rule adopted in the federal cases is that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity,' [*citing to Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C.Cir.1974).] In appiying this rule, federal courts will look closely at the purpose of the federal statute to

> absence of the formalities which are part and parcel of normal corporate existence, i.e., the election of directors, keeping of corporate records; 2) inadequate capitalization; 3) personal use of corporate funds; and 4) the perpetration of fraud by means of the corporate vehicle.... (citations omitted) Further, a corporation's form may be disregarded where the corporation has been a mere shell 'dominated and controlled by the individuals to carry on their own personal business.'

Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc., 599 F.Supp. 940, 943 (S.D.N.Y.1984), *quoting England Strohl/Denigris, Inc. v. Weiner*, 538 F.Supp. 612, 613-14 (S.D.N.Y.1982), *aff'd* 740 F.2d 954 (2d Cir.1984).

[4] The facts before this court provide a more-than-adequate basis for piercing the corporate veil, thereby holding the individual defendants, Levy, Kovnat, and Wheeler, personally liable. The close and intimate relationship between the corporate and individual defendants is clear. The few employees of the corporate defendants performed services for all three entities simultaneously, at offices shared by them, without particular regard for which entity paid their salaries. The corporate defendants had virtually "zero net worth." The company bank records produced by defendants document numerous transfers of funds among the corporate entities in the form

> determine whether the statute places importance on the corporate form [*citations omitted*], an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine.

Alman, 801 F.2d at 3 citing Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir.1981).

of loans, dividends or investment capital, and from Capital to the individual defendants in the form of reimbursements for travel and related expenses; a large portion of the expenses reimbursed to Kovnat and Wheeler are undocumented.

Given the above, to the extent that the corporate defendants are fiduciaries under ERISA, the corporate veil will be pierced and the individual defendants are deemed to be fiduciaries.

VI.

Congress adopted specific prohibitions in Section 406, 29 U.S.C. § 1106, "to prevent categories of transactions which offer a high potential for insider abuse of plans or for loss of plan assets." *Freund v. Marshall & Ilsley Bank*, 485 F.Supp 629, 637 (W.D.Wis.1979) (*citation omitted*).

In pertinent part, § 406(b) prohibits a fiduciary from dealing "with the assets of the plan in his own interest or for his own account," (§ 406(b)(1)) or from receiving "any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." (§ 406(b)(3)).

The legislative history of § 406(b) and relevant case law indicate that Congress sought to prevent "kickbacks", making "illegal per-se the types of transactions that experience had shown to entail a high potential for abuse." *Donovan v. Cunningham*, 716 F.2d 1455, 1565 (5th Cir. 1983) *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984) (*citations omitted*). See 1974 U.S.Code Cong. & Admin. News, 4639, 5038, 5089.[8]

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8. ERISA § 406(b), 29 U.S.C. § 1106(b), was set up with the following rational:

> The prohibitions of section 406(b) supplement the other prohibitions of section 406(a) of the Act by imposing on parties in in-

Section 406(b) thus creates a per se ERISA violation; even in the absence of bad faith, or in the presence of a fair and reasonable transaction, § 1106(b) establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans.
Gilliam v. Edwards, 492 F.Supp. 1255, 1263 (D.N.J.1980) *citing Cutaiar v. Marshall*, 590 F.2d 523, 529-30 (3rd Cir.1979); *see also Brink v. DaLesio*, 496 F.Supp. 1350 (D.Md.1980), *aff'd in part and rev'd in part*, 667 F.2d 420(4th Cir.1982) (trustee of a pension plan, having accepted gratuities from individuals providing services to the plan, violated ERISA § 406(b)(3) even though it had not been proven that the transaction was a *quid pro quo* for the gratuities or that harm had resulted).

A. § *406(b)(1)*

[5] The defendants' violation of § 406(b)(1) is readily apparent. On numerous occasions the defendants dealt with the assets of the Plans in their own interests or for their own accounts. The following are a few examples of the defendants' use of the Plans' assets as a vehicle for advancing their own interests.

(1) Levy, Kovnat, and Wheeler, as officers and directors of Asset, caused the Plans to invest in companies in which they had equity interests.

> terest who are fiduciaries a duty of undivided loyalty to the plans for which they act. These prohibitions are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interests of the plans for which they act. In such cases, the fiduciaries have interests in the transactions which may affect the exercise of their best judgment as fiduciaries.
> 29 C.F.R. § 2550.408b-2(e)(1).

(2) Asset agreed to provide consulting services to Rolfite (for a flat retainer of $5,000 per month) at the same time as it agreed to invest the Plans' funds in Rolfite.

(3) Securities agreed to provide investment banking services to Rolfite for large fees and commissions on the same day as its subsidiary Asset purchased $200,000 in subordinated debentures for te Plans.

(4) Capital received a $25,000 investment banking fee from Double Eagle Lines, the payment of which was contingent on a $300,000 loan made by the Plans.

B. § *406(b)(3)*

[6] Plaintiffs have argued that Asset, the entity engaged to make investment decisions regarding the Plans' assets, channeled Plan funds into companies with which Securities and Capital had recently or contemporaneously entered into investment banking agreements; these investment banking agreements then resulted in equity interests and fees of $1,087,787 being received by defendants Capital and Securities.

The defendants have taken the position that plaintiffs § 406(b)(3) claim should fail because plaintiffs have not shown the "required causal conection between the fees and Plan investments." Defendants assert that the plaintiffs "rely entirely on speculation and conjecture and in several instances, on nothing more than coincidences in the timing of certain investments."

The plaintiffs have provided sufficient evidence to demonstrate that the defendants acted in concert and in violation of § 406(b)(3). The following are but a few examples:

(1) Asset received consulting fees from Rolfite, a company in which it was investing Plan assets.

(2) Securities received a $25,000 fee from Rolfite for investment banking services which included the private placement of capital.

(3) Capital obtained a $25,000 investment banking fee from Double Eagle, contingent upon the Plans' purchase of a $300,000 debenture.

C. *Exemptions Under § 408*

[7] The defendants have argued that their receipt of consideration was reasonable compensation for services actually rendered and therefore, falls under exemptions provided in § 1108(b)(2) and (c)(2).[9] The argument does not have merit.

The Department of Labor regulations provide that acts otherwise prohibited by § 406(b) are not exempted under § 408(b)(2):

> [S]ection 408(b)(2) does not contain an exemption from acts described in section 406(b)(1) of the Act ...

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9. Section 1108(b)(2) and (c)(2) provide:

(b) The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

* * * * * * * * *

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, acounting, or other services necessary for the establishment or operation of the plan, if no more thankr easonable compensation is paid therefor.

(c) Nothing in section 1106 of this title shall be construed to porhibit any fiduciary from-

* * * * * * * * *

(2) receiving any reasonable compensation for services rendered, or for reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participatnts in such a plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred;

29 U.S.C. § 1108(b)(2) and (c)(2).

> or section 406(b)(3) of the Act.... Such acts are separate transactions not described in section 408(b)(2).
>
> If the furnishing of office space or a service involves an act described in section 406(b) of the Act (relating to acts involving conflicts of interest by fiduciaries), such an act contitutes a separate transaction which is not exempt under 408(b)(2) of the Act.

29 C.F.R. §§ 2550.408b-2(a), (e).[10]

[8] Section 1108(c)(2) authorizes a fiduciary to receive "reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan ..." It pertains to compensation for services to the plan, and provides no exemption with respect to compensation "from any party dealing with such plan in connection with a transaction involving the assets of the plan." § 1106(b)(3).

Although there are few documented instances of Asset receiving direct compensation for Plan-related investments, the transactions with Rolfite exemplify how Asset used the Plan investments to derive other compensation. In the Rolfite case, Asset, in conjunction with its agreement to purchase debentures from Rolfite on behalf of the Plans, also contracted to provide consulting services to Rolfite were not part of their Plan-related services.

The defendants have argued that plaintiffs' knowledge and approval of the fees obtained by Capital

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10. The Dpeartment of Labor ("DOL") regulations have been given great weight by courts interpreting the provisions of § 1108, and will be followed by this court as well. *See Donovan v. Daugherty*, 550 F.Supp. 390, 404 n.3 (S.D.Ala.1982); *Gilliam v. Edwards*, 492 F.Supp. 1255, 1262-63 (D.N.J.1980); *Marshall v. Kelly*, 465 F.Supp. 341, 354 (W.D.Okla.1978).

and Securities estop them from challenging the fees. This "consent" argument is based on the theory that a "fiduciary may act on behalf of a beneficiary even in the face of an apparent or potential conflict of interest-provided the beneficiary is aware of such conflict and consents to the fiduciary's continuing to act on his behalf."

[9] Plaintiffs, however, were not beneficiaries but trustees. A beneficiary's consent to a trustee's action is qualitatively different than a trustee's consent to a violation by another fiduciary, particularly an investment manager. Section 1105(a)(3) of ERISA provides in relevant part that "a fiduciary with respect to a plan shall be laible for a breach of fiduciary responsibility of another fiduciary with respect to the same plan ... (3) if he has knowledge of a breach by such other ficuciary, unless he makes reasonable efforts ... under the circumstances to remedy the breach." A trustee's consent to a prohibited transaction would not absolve the fiduciary responsible from a finding of § 406 liability; the consent would itself be violative of ERISA.[11]

VII.

[10] The starting point for determining relief under ERISA is 29 U.S.C. § 1109(a), which provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter

11. In particular, § 1105(c) and (d) lay out the provisions having to do with the allocation of fiduciary responsibility of investment managers.

The investment management agreements between Asset and the Plans vested Asset with fiduciary responsibility for managing the funds fo the Plans. Thus, regardless of consent by the trustees, the investment managers had an affirmative obligation not to breach their fiduciary duties.

> shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Thus "ERISA grants the court wide discretion in fashioning legal and equitable relief to make the plan whole and protect the rights of the beneficiaries, including recession of unlawful transactions and recovery of monetary loss to the plan." *Gilliam v. Edwards*, 492 F.Supp. 1255, 1266-67 (D.N.J.1980) (*citations omitted*); *see also Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 643 (W.D.Wis.1979).

The plaintiffs are entitled to: (1) restitution to the Plans of all profits and other forms of consideration received by defendants in violation of ERISA § 406; and (2) the full extent of the Plans' investment losses in companies from which defendants received fees.

Plaintiffs have made a clear showing that the individual and corporate defendants profited by their receipt of fees and other forms of consideration "in connection" with the investment of Plan assets. There being no issues of material fact as to the amount of fees collected by defendants, judgment has been entered ordering restitution of those fees, totalling $1,087,787, as well as the identified equity interests obtained by defendants in connection with the investment of Plan assets.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MASTERS, MATES & PILOTS
PENSION PLAN and IRAP LITIGATION

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85 Civ. 9545 VLB

April 18, 1991, 2:00 p.m.

Before:

HON. VINCENT L. BRODERICK
District Judge

HON. NAOMI REICE BUCHWALD
Magistrate Judge

COUNSEL PRESENT

E. CALVIN GOLUMBIC
DAVID GERSCH
ALAN SANDALS
THOMAS CURNIN
PATRICIA FARREN
FRANK HAMILTON, III
CAROL PISANO
ANDREW A. LEVY
SHAWN HANSON
JACOB P. HART
KEN KLEIN
J. HARDIN MARION
VIRGIL B. DAY
GLENN J. FUERTH
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ARTHUR N. LAMBERT
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JAMES R. EYLER
DAVID S. PREMINGER
MARIAN HERTZ
PAUL J. ONDRASIK
WILLIAM CARRIER III
NEAL I. KORVAL
BARRY KLAYMAN

$1,087,000 now for since the Plans already have such a judgment and on the appeal with respect to that judgment you intervened and urged that that judgment be entered?

MR. SACHER: I did indeed. The purpose for our including it was so that we could help the Plan collect that judgment. There may be means availble to the government to locate assets that aren't available to a private party.

THE COURT: You think there might be?

MR. SACHER: Yes, sir. There are. And that's the reason for having a judgment in our favor. But it will not be a double recovery and whatever, to the extent that's unclear, to the extent that's an issue, then I'm certainly willing to stipulate to that fact here and do whatever else needs to be done to make it clear that there's not going to be a double recovery of that amount of money as against the Tower defendants.

THE COURT: Well, I do grant the motion for summary judgment against the Tower defendants. The issue of liability was considered in the Lowen v. Tower case. It was in full consideration of the position of the Tower defendants at that time. Findings were made. Those findings were reviewed on appeal by the Court of Appeals which took no different course than I took, with one exception. I found that all of the Tower defendants, the corporate defendants and the individual defendants, were fiduciaries and the judgment that I entered on that basis was affirmed.

The Court of Appeals may have had some question as to whether any of the entities or individuals other than Tower Asset was technically a fiduciary, but the Court of

Appeals certainly found that there was knowing participation by all of the corporate and individual defendants in the breaches of fiduciary duty by Tower.

And if that is a difference between the case below and the case on appeal, it is a difference without, so far as I can see, significance.

I also grant the portion of the application which will enjoin the Tower defendants permanently from serving as fiduciaries for any ERISA Plan.

The findings that have already been made are findings which have the same application in the case brought by the participant plaintiffs and by the DOL as they had in the case brought by the Plan.

And the findings that were made in the case brought by the Plan are, for all practical purposes, res adjudicata in the DOL case and the participants case.

MR. LEVY: Thank you, your Honor.

I just wanted to mention one other thing. We did argue strenuously in our opposition to the Department of Labor's motion for summary judgment that there were equitable factors involved in the granting of an injunction that have never been considered in this case and that have

been traditionally considered in jurisprudence in granting an injunction and there never has been a hearing on any of the Tower matters. The original judgment was again a motion for summary judgment. There has never been any opportunity to present evidence, particularly evidence such as reliance on advice of counsel.

As we count, there are 23 law firms that were aware of all of Tower's relationships with this plan who never advised against it and we think that's a good defense or certainly an equitable consideration in granting such a serious injunction without a hearing. And we believe we have the right to a hearing where we can present evidence of mitigating circumstances before an injunction can be issued.

And we believe that's pretty clear from the law and the cases that we cited in our memorandum.

THE COURT: That argument was made in your papers. I carefully considered that argument in your papers. I determined that the findings have already been made here and are res adjudicata with respect to the fiduciary violations that took place.

We're not dealing here with a preliminary injunction in the first place. We are not dealing with a securities law violation in the second place.

We are dealing with violations of fiduciary obligations which in my judgment are the very highest obligations that the law imposes. And I really don't see, in light of the findings upon which summary judgment is based, that there is any reason for an evidentiary hearing with respect to injunctive relief.

MR. LEVY: Well, not to be argumentative, but one of the factors that does have to be considered and a finding has to be made is whether there's a likelihood of repetition which is a sine qua non to the entering of an injunction, I believe.

THE COURT: I also read that in your papers and I just don't think it is necessary to find that. There is in your papers an undertaking by you to the effect that you have no present intention of offering fiduciary services. That, to me, is just not adequate.

MR. LEVY: Yes. I just want to know if your Honor is making a finding that there is a likelihood of repetition. I think that's part of the findings that would be required to enter an injunction.

THE COURT: I think there is a likelihood of repetition. I think when you say that you have no present intention of serving as a fiduciary, that leaves the necessary implication that at some future time your mind may change. And I don't think that in light of the very serious breaches of fiduciary duty that took place in this case that the public should be left open to that possibility.

MR. LEVY: Thank you, your Honor.

MAGISTRATE JUDGE BUCHWALD: The only thing I wanted to say is that the judge has set May 30 as the fish or cut bait deadline. It was suggested to me that I hold another conference before then to hear from anybody who still had problems. I was going to suggest the 8th of May or perhaps the 7th of May and we can do that in my chambers at eleven o'clock.

Now, I don't want to have a repetition of what happened on Friday, where all the people that thought it settled showed up to tell me about some new problems. These are just the last few remining problems, if they have not settled as of that point.

THE COURT: Anything else?

Thank you, very much.

(Proceedings adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Masters, Mates & Pilots
Pension Plan and IRAP Litigation

This Document Relates To:
87 Civ. 1492 (VLB) (Martin)[1]
87 Civ. 1798 (VLB) (Cullen)
86 Civ. 6315 (VLB) (Bomerato)

Master File No. 85 Civ. 9545(VLB)
FINAL JUDGMENT

FINAL JUDGMENT AS TO DEFENDANTS ANDREW A. LEVY, SAMUEL KOVNAT, W. RANDOLPH WHEELER, TOWER ASSET MANAGEMENT, INC., TOWER CAPITAL CORPORATION AND TOWER SECURITIES

This action having come on for decision pursuant to the Secretary of Labor's and the Private Plaintiffs' Motion for Partial Summary Judgment and the Court having considered the papers filed in support and in opposition thereof, and the Court having rendered its decision granting partial summary judgment with respect to the claims that the defendants violated section 406(b) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1106(b), and having directed the entry of judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants Andrew A. Levy, Samuel Kovnat, W. Randolph Wheeler, Tower Asset Management, Inc., Tower Capital Corporation and Tower Securities, and each of them, be and hereby are permanently enjoined from serving directly or indirectly as fiduciaries, investment managers, investment advisors or other service providers to any employee benefit plan covered by Title I of ERISA.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Andrew A. Levy, Samuel Kovnat, W. Randolph Wheeler, Tower Asset Management, Inc., Tower Capital Corporation and Tower Securities, their agents, servants, employees, attorneys-in-fact, and all persons in active concert or participation with them who receive actual notice hereof, and each of them, be and hereby are permanently enjoined from violating, inducing others to violate or knowingly participating in any violation of any provision of Title I of ERISA.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Andrew A. Levy, Samuel Kovnat, W. Randolph Wheeler, Tower Asset Management, Inc., Tower Capital Corporation and Tower Securities, shall jointly and severally make restitution by payment to the Masters, Mates and Pilots Pension Plan and Individual Retirement Account Plan (the "Plans") the sum of $1,087,787, which sum represents fees received by defendants in violation of Section 406(b) of ERISA.

Monies paid by the defendants to the Plans in satisfaction of the February 27, 1987 judgment for $1,087,787 against defendants in *Lowen, et al. v. Tower Asset Management, et al.*, 85 Civ. 9545 (VLB) shall also be deemed to be in satisfaction of this judgment.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court retains jurisdiction of these actions to enforce the terms of this Judgment.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court retains jurisdiction of these actions to determine any and all claims not finally adjudicated herein, including the claim that defendants restore to the Plans the losses to the Plans as a result of defendants' breaches of ERISA.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, there being no just reason for delay in entering this Judgment, this Judgment be entered as a Final Judgment pursuant to Fed. R. Civ. P. 54(b).

So Ordered:
s/ FTL Brodl
U.S.D.J. 5/7/91

Dated: White Plains, New York

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1. Pursuant to Fed. R.Civ. P. 25(d)(1), Lynn Martin is substituted for Elizabeth Dole as the Secretary of Labor.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 379—August Term, 1991

(Argued: October 21, 1991 Decided: October 22, 1991)

Docket No. 91-6174

HAROLD BECK, PAUL H. NIELSEN, KEN BRYANT, A.J. MORALES, PETE PREVAS, GUY CHADBOURNE, FLORIN DENTE, JOHN HAYES, JAMES N. HAVERFIELD, individually and on behalf of all others similarly situated, PETER MCGUIRE, on behalf of themselves and all others similarly situated,

Plaintiffs,

ANDREW CULLEN, GEORGE BOMARETO and LYNN MARTIN, Secretary of the U.S. Department of Labor,

Plaintiffs-Appellees,

—v.—

WALTER LEVERING, ALLEN C. SCOTT, ROBERT LOWEN, LLOYD M. MARTIN, FRANCIS E. KYSER, ROBERT MURPHY, ESQUIRE, JAMES R. HAMMER, EDMUND DAVIS, FRANKLIN K. RILEY, ANTHONY NACCARATO, MICHAEL SWAYNE, CARMINA J. BRACCO, HENRY NEREAUX, EDWARD MORGAN, DAVID BOYLE, RICHARD EVANS, ALLEN TAYLOR, W. BROBST, MM & P INDIVIDUAL RETIREMENT PLAN, MM & P PENSION PLAN,

Defendants,

ANDREW A. LEVY, TOWER ASSET MANAGEMENT, INC., TOWER CAPITOL CORPORATION, TOWER SECURITIES, INC., WILLIAM RANDOLPH WHEELER and SAMUEL KOVNAT,

Defendants-Appellants.

Before:

TIMBERS, WINTER, and WALKER,

Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York (Vincent L. Broderick, *Judge*) permanently enjoining appellants from serving as ERISA fiduciaries.

We affirm.

ANDREW A. LEVY, New York, New York, *Pro Se* and Attorney for *Tower Capital Corp., Tower Asset Management, Inc. and Tower Securities, Inc.*

William Randolph Wheeler, New York, New York, *Pro Se.*

Samuel Kovnat, North Stonington, Connecticut, *Pro Se.*

ELIZABETH A. GOODMAN, Plan Benefits Security Division (David Fortney, Deputy Solicitor of National Operations, U.S. Department of Labor, Plan Benefits Security Division, Marc I. Machiz, Associate

Solicitor, Karen L. Handorf, Counsel for Decentralized and Special Litigation, Jeff Sacher, Counsel for General Litigation, Washington, D.C., David S. Preminger, Liaison Counsel for Private Plaintiffs, New York, New York, of counsel), *for Plaintiffs-Appellees Brock and Cullen, et al.*

PER CURIAM:

Appellants Andrew Levy, Tower Asset Management, Inc., Tower Securities, Inc., Samuel Kovnat and William R. Wheeler (collectively "Tower"), appeal from Judge Broderick's order, entered on a partial summary judgment motion and permanently barring appellants from acting as fiduciaries or providing services to ERISA plans and granting restitution. Because the order was properly based on the collateral estoppel effect of a previous decision in a related action, we affirm..

In 1985, the Trustees of the Masters, Mates and Pilots' Individual Retirement Account Plan and Pension Plans (the "Plans") sued Tower Asset Management and its principal managers, including the individual appellants, for self-dealing and breach of their fiduciary obligations in violation of Sections 406(b)(1) and (3), 29 U.S.C. §§ 1106(b)(1) and (3) (1988). Judge Broderick entered summary judgment for the plaintiffs. *Lowen v. Tower Asset Management, Inc.*, 653 F. Supp. 1542 (S.D.N.Y. 1987). We affirmed, noting that the uncontradicted evidence was that defendants "caus[ed] the investment of approximately $30 million of the Plans' assets in com-

panies in which one or more of the defendants owned an interest and/or from which one or more defendants received fees or other consideration. The investments caused the Plans to lose more than $20 million." *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1212 (2d Cir. 1987). Familiarity with our prior decision is assumed.

The participants and beneficiaries of the Plans also filed several actions against appellants. These were consolidated before Judge Broderick, who certified a class action. Simultaneously, the Secretary of Labor filed the present action against appellants. The Secretary's action relied on the same evidence detailed in *Lowen* and was consolidated with the other actions. Judge Broderick granted plaintiffs' motion for summary judgment based on the collateral estoppel effect of the factual and legal findings of *Lowen*.

Appellants, who invoked the privilege against self-incrimination during the *Lowen* proceedings and successfully avoided prosecution until the statute of limitations had run, now boldly contend that the district court erred in barring them from performing any future services for ERISA pension plans. The fact that they now appear before this court without remorse, with a kitbag of transparent excuses and frivolous legal contentions, demonstrates for us the wisdom of Judge Broderick's ruling.

ERISA prohibits certain transactions because they inherently compromise the duty of trust that is imposed upon a fiduciary. 29 U.S.C. § 1106 (1988). When a duty of loyalty is violated by a fiduciary, the statute provides for penalties to be assessed against that person. 29 U.S.C. § 1109 (1988). Although section 1109 enumerates a variety of penalties, we are free to fashion other remedies,

including those developed under the law of trusts, tailored to the special nature of employee benefit plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989).

Although we have never ruled that permanent injunctions are available as a remedy under ERISA, it is self-evident that such a remedy may be appropriate where individuals participate in the kind of egregious self-dealing proved in *Lowen*. Congress intended to make the full range of equitable remedies available. "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1104, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Id.* at 110 (quoting H.R. Rep. No. 533, 93d Cong., 2d Sess. 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649). Permanent injunctions are among the remedies available under the law of trusts. To deny the power in federal courts to issue permanent injunctions would, therefore, fly in the face of both precedent, Congressional intent, and common sense.

Appellants contend that concrete proof of future wrongdoing is required before a permanent injunction may be granted. We reject the argument that ERISA fiduciaries and their associates must be allowed to loot a second pension plan before an injunction may be issued. ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction. In the context of securities fraud, we have held that a permanent injunction may be warranted based on the nature of defendants' violations of the securities laws. *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1102 (2d Cir. 1972). The violations of ERISA set out in *Lowen* were neither technical nor isolated. The defendants, appellants here, had done

precisely what the statute expressly forbids and in a massive way.

Appellants contend that Fed. R. Civ. P. 65 requires that an evidentiary hearing be held in order to issue a permanent injunction. However, Rule 65 requires hearings for preliminary injunctions, not permanent injunctions. Moreover, we have held that "even in suits for injunctive relief, the district courts should not hesitate to grant a plaintiff's request for summary judgment when the defendant has failed to meet the requirements prescribed by Rule 56(e)." *SEC v. Research Automation Corp.*, 585 F.2d 31, 33-34 (2d Cir. 1978). Had a material fact been in dispute, then a hearing should have been granted. However, plaintiffs' suit is based on the record that was established in *Lowen*, and there are no material facts are at issue.

Appellants next contend that the court erred in applying the offensive collateral estoppel doctrine. This claim is also without merit. The doctrine of collateral estoppel prevents previously litigated issues from being relitigated, thereby producing finality in judgments. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1987). In *Gelb*, this court established a four-part test to determine if the doctrine of collateral estoppel applies:

> (1) the issues in both proceedings must be identical, (2) the issue in the prior proceedings must have been actually litigated and actually decided, (3) there must have been full and fair opportunity for the litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.

Id. The district court correctly concluded that the plaintiffs had met each of the legs of the test. This suit involves the same transactions at issue in *Lowen*. The vio-

lation of Section 406 of ERISA for self-dealing transactions was the subject of the summary judgment in the prior case. Appellants in this case had a full and fair opportunity to litigate the issue both at the trial level and on review by this court in *Lowen*. Finally, the violation of 29 U.S.C. § 1106 was litigated, and the prior determination supports the present judgment on the merits.

Finally, appellants contend that the doctrine of *res judicata* prohibits the Secretary of Labor and the private plaintiffs from recovering monetary relief that duplicates the relief granted in the prior action. Again the argument is frivolous. Application of *res judicata* in these circumstances is designed to prevent double recoveries. However, the judgment here is concurrent, and appellants are not subject to double recovery because the judgment merely decreases the amounts recouped by the Plans by the sums recovered by the private plaintiffs. This ensures some recovery for the Plans in the event that the trustees are incapable or unwilling to secure recovery for them. In some instances, the trustees may be faced with potential liability and their interest in absolving themselves may conflict with the private litigants' interest in fair adjudication of the issues and full recovery. Because of the possibility that the trustees will not act, 29 U.S.C. § 1132(a) (1988) authorizes the Secretary of Labor to bring suit concurrently with private plaintiffs to recover appropriate damages. The judgment in the instant case fulfills that statutory purpose.

For the reasons stated above, the judgment of the district court is affirmed.

RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58: and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and accorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence

received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is exended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a

preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of jusce require.

CONSTITUTION OF THE UNITED STATES
ARTICLE [V]

No person shall be *** nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

(2)

No. 91-1272

In the Supreme Court of the United States

OCTOBER TERM, 1991

ANDREW A. LEVY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when there is no genuine issue of material fact, a district court may enter a permanent injunction barring individuals from serving as fiduciaries or service providers to employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).

2. Whether a finding of numerous, serious violations of ERISA is a sufficient basis on which to grant such an injunction.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1272

ANDREW A. LEVY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 42a-48a) is reported at 947 F.2d 639. The judgment of the district court (Pet. App. 39a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1991. The petition for a writ of certiorari was filed on January 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Andrew Levy and W. Randolph Wheeler seek review of a permanent injunction barring them from serving as fiduciaries or service pro-

viders to employee benefit plans. Levy and Wheeler were officers, directors, and stockholders of Tower Asset Management Corp., an investment manager, and its parent and an affiliate; each owned 25% of the companies. Pet. App. 7a.[1] The Tower companies and their principals engaged in over 100 prohibited transactions between 1983 and 1986 while serving as an investment manager to the International Organization of Masters, Mates and Pilots Individual Retirement Account Plan and Pension Plan. "[T]he uncontradicted evidence was that [petitioners and Tower] 'caus[ed] the investment of approximately $30 million of the Plans' assets in companies in which one or more of the [petitioners or Tower] owned an interest and/or from which one or more of the [petitioners or Tower] received fees or other consideration. The investments caused the Plans to lose more than $20 million.'" *Id.* at 44a-45a, quoting *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1212 (2d Cir. 1987).

The prohibited transactions fell into two general categories. In one category "[t]he [Tower companies] received fees and commissions totaling $1,087,787 or stock ownership interests, or both, from at least twenty-six companies in which Plan assets were invested." Pet. App. 8a; see *id.* at 9a-15a. In the second category, the Tower companies either acquired equity interests in various corporations, for nominal payments or at discounted rates, in connec-

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[1] The third Tower principal was Samuel Kovnat, who owned 50% of the companies. Although a defendant below, Kovant has not petitioned for a writ of certiorari. Wheeler, although a petitioner in this Court, did not file or join in a brief in the court of appeals. Petitioner Levy filed a brief in the court of appeals on behalf of himself and the corporate Tower defendants.

tion with the investment of Plan assets, or petitioners invested substantial Plan assets in companies in which the Tower companies or their individual principals already had a substantial ownership interest. *Id.* at 16a. While the court of appeals noted in 1987 that the evidence showed that the Plans had lost more than $20 million (see *id.* at 45a), the magistrate has since found that the losses to the Plans as of September 1987 amounted to $34.2 million, plus interest. C.A. App. A10 (docket entry) (No. 91-6174).

2. In a prior case, the trustees to the Plans sued the Tower corporations and their principals (including petitioners), alleging multiple fiduciary breaches and prohibited transactions in violation of Sections 406 and 409 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1106 and 1109. The trustees moved for partial summary judgment to secure restitution for the unlawfully obtained fees and equity interests, and to establish their entitlement to damages for losses incurred by the Plans as a result of the prohibited transactions. See 29 U.S.C. 1109, 1132(a)(2). Following oral argument, and after "consider[ing] the pleadings, depositions, and exhibits," the district court found that there were "no genuine issues as to any material fact" and granted the trustees' motion. Pet. App. 6a. In its memorandum opinion, the court ruled that petitioners were fiduciaries within the meaning of Section 3(21) of ERISA, 29 U.S.C. 1002(21). Pet. App. 17a-26a. With respect to petitioners, it found "a more-than-adequate basis for piercing the corporate veil" to hold them personally responsible as ERISA fiduciaries. *Id.* at 25a. The court then found it "readily apparent" that petitioners had violated Section 406(b)(1) of ERISA, 29 U.S.C. 1106(b)(1)—the prohibition against fiduciary self-dealing—be-

cause "[o]n numerous occasions the[y] dealt with the assets of the Plans in their own interests or for their own accounts." Pet. App. 27a. The court further found that, by accepting fees and equity interests from companies in which they invested Plan assets, the petitioners violated Section 406(b)(3) of ERISA, 29 U.S.C. 1106(b)(3), the "anti-kickback" provision that prohibits the receipt of any consideration for the personal benefit of a fiduciary from "any party dealing with such plan in connection with a transaction involving the assets of the plan." Pet. App. 26a. The court therefore ordered restitution of the $1,087,787 in fees collected by petitioners, as well as restitution of the equity interests petitioners acquired in connection with their unlawful investment of Plan assets. *Id.* at 32a.[2]

The court of appeals affirmed.[3] With regard to the Section 406(b)(1) self-dealing violations, it found that "[petitioners] offer not even a colorable argument that these investments were permissible." 829 F.2d at 1214. With regard to the Section 406(b)(3) kickback violations, it held that in the face of "overwhelming evidence of kickbacks" petitioners had failed to show that there was no connection between the investments they made and the fees received from the various companies. 829 F.2d at 1217. Moreover, the court of appeals determined that "[t]he individual [petitioners] were in no way passive investors in

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[2] The district court did not rule on the losses to the Plans resulting from the prohibited transactions, but directed the magistrate to make that determination. *See Lowen*, 829 F.2d at 1221.

[3] The Secretary of Labor, who had been investigating the same transactions and who had filed this action while the appeal was pending, intervened for purposes of the appeal. 829 F.2d at 1213.

the corporate defendants. They personally and actively controlled and dominated those firms." *Id.* at 1221. It therefore held that "the individual [petitioners] are jointly and severally liable with Tower Asset [and the affiliated companies] because they acted in concert with the latter in causing the prohibited investments." *Id.* at 1220; see *id.* at 1221.

3. In the meantime, class actions were filed on behalf of the Plans' participants and beneficiaries against the Tower defendants and the Plan trustees alleging multiple fiduciary breaches. The Secretary of Labor also brought this action, which was consolidated with the class actions of the private plaintiffs. The Secretary's complaint contained many of the same allegations raised in the trustees' suit and relied on the same facts. Pet. App. 45a. The Secretary, however, sought broader relief, including a permanent injunction barring petitioners from serving as ERISA fiduciaries or service providers. C.A. App. A88-A100 (No. 91-6174). Extensive discovery ensued until November 1, 1990, when the Secretary and the private plaintiffs filed a motion for partial summary judgment. *Id.* at A10-A30 (docket entries). In their depositions, petitioners invoked their Fifth Amendment privilege against self-incrimination and refused to answer any questions directed toward their roles as officers and principal shareholders of the Tower companies. *Id.* at A207-A213; see Pet. App. 45a.

The summary judgment motion asked the court to order restitution and permanent injunctive relief based on the collateral estoppel effect of the determinations in the prior decision. C.A. App. A189-A191 (No. 91-6174). The district court granted the motion on April 18, 1991, explaining that "[t]he issue of liability was considered in the *Lowen* v. *Tower* case.

* * * The findings that have already been made are findings which have the same application in the case brought by the participant plaintiffs and by the DOL as they had in the case brought by the Plan. And the findings that were made in the case brought by the Plan are, for all practical purposes, res adjudicata in the DOL case and the participants case." Pet. App. 34a-35a.[4] The court then permanently enjoined petitioners "from serving directly or indirectly as fiduciaries, investment managers, investment advisors or other service providers to any employee benefit plan covered by Title I of ERISA." *Id.* at 40a. The court also ordered petitioners to make restitution to the Plans of $1,087,878, to be offset by any payments they make in satisfaction of the prior judgment against them. *Id.* at 40a-41a.

4. The court of appeals affirmed in a per curiam decision. Pet. App. 42a-48a. Responding to petitioners' argument that the district court erred by barring them from performing any services for employee benefit plans, the court opined that "[t]he fact that [petitioners] now appear before this court without remorse, with a kitbag of transparent excuses and

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[4] Responding directly to petitioner Levy's arguments that an evidentiary hearing had to be held and a finding of likelihood of recurrence needed to be made before a permanent injunction could issue, the court added: "There is in your papers an undertaking by you to the effect that you have no present intention of offering fiduciary services. That, to me, is just not adequate. * * * I think there is a likelihood of repetition. I think when you say that you have no present intention of serving as a fiduciary, that leaves the necessary implication that at some future time your mind may change. And I don't think that in light of the very serious breaches of fiduciary duty that took place in this case that the public should be left open to that possibility." Pet. App. 37a.

frivolous legal contentions, demonstrates for us the wisdom of [the district court's] ruling." *Id.* at 45a. Finding it "self-evident that such a remedy may be appropriate where individuals participate in the kind of egregious self-dealing proved in *Lowen*," the court rejected the argument that "concrete proof of future wrong-doing is required before a permanent injunction may be granted." *Id.* at 43a. Rather than allow petitioners "to loot a second pension plan before an injunction may be issued," the court of appeals concluded that "serious misconduct that violates statutory obligations" is sufficient. *Ibid.* The court emphasized that "[t]he violations of ERISA set out in *Lowen* were neither technical nor isolated. [Petitioners] had done precisely what the statute expressly forbids and in a massive way." *Id.* at 46a-47a.

The court of appeals likewise rejected the contention that Fed. R. Civ. P. 65 required the district court to hold a hearing before issuing a permanent injunction. The court determined that Rule 65 applies only to preliminary, not permanent, injunctions and that suits for injunctive relief may appropriately be resolved by summary judgment where, as here, there are no material facts in dispute. Pet. App. 47a. Moreover, the court approved the district court's application of collateral estoppel because it concluded that petitioners "had a full and fair opportunity to litigate the issue [of ERISA liability] both at the trial level and on review by this court in *Lowen*." *Id.* at 48a.[5]

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[5] The other three legs of the collateral estoppel doctrine were also met: "(1) the issues in both proceedings [were] identical, (2) the issue in the prior proceedings [was] actually litigated and actually decided, * * * and [(3)] the issue previously litigated [was] necessary to support a valid and final

ARGUMENT

The courts below correctly decided that a permanent injunction was an appropriate remedy for petitioners' many egregious violations of their duties under ERISA and that an injunction could be granted on a motion for summary judgment based on the facts that had been fully litigated in a related case. The decision below does not conflict with any decision of this Court or any other courts of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 7-8) that a permanent injunction of this nature cannot be granted on summary judgment. They are mistaken. Rule 56, by its terms, is applicable to all actions: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Advisory Committee Notes on Rules 1937 Adoption (Rule 56 "is applicable to *all* actions" (28 U.S.C. App. at 670) (emphasis added)). Accordingly,

> [t]he basic principles generally applicable to summary judgment procedure apply in actions seeking injunctive relief, since there is no reason to differentiate between such actions and any other action. Summary judgment is, therefore, properly rendered in accordance with applicable substantive legal principles where there is no genuine issue of material fact; and is denied

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judgment on the merits." Pet. App. 47a, citing *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987).

> when the lack of such a factual issue is not established with certainty.

6 J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.17[30], at 56-487 to 56-489 (2d ed. 1988) (citations collecting cases omitted); see also 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2731 (2d ed. 1983) (collecting cases in n.10). In particular, "[t]he procedure has been effectively used at times by governmental agencies and officials to enjoin violation of, or compel compliance with, statutes, with whose enforcement they are charged." *Moore's Federal Practice*, *supra*, ¶ 56.17[30], at 56-490. See, *e.g.*, *SEC* v. *Geyser Minerals Corp.*, 452 F.2d 876 (10th Cir. 1971); *Auto Drive-Away Co.* v. *ICC*, 360 F.2d 446 (5th Cir. 1966); *Bagby* v. *United States*, 199 F.2d 233 (8th Cir. 1952). Thus, contrary to petitioners' supposition (Pet. 8 & n.3), courts routinely have granted permanent injunctions by way of summary judgment.[6]

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[6] As the court below determined (Pet. App. 47a), Rule 65's hearing requirement for *preliminary* injunctions is wholly inapplicable to the issuance of *permanent* injunctions. Moreover, even requests for preliminary injunctive relief undoubtedly may be granted without a hearing if there are no genuine issues of material fact. See, *e.g.*, *FSLIC* v. *Dixon*, 835 F.2d 554, 558-559 (5th Cir. 1987); cf. *SEC* v. *Frank*, 388 F.2d 486, 490-491 (2d Cir. 1968). As in other cases, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, Rule 52(a)'s requirement that courts make findings of fact and conclusions of law before granting or refusing to grant *interlocutory* injunctions does not imply, as petitioners contend (Pet. 7), that a permanent injunction cannot be granted on summary judgment. Permanent injunctions are not interlocutory and thus do not

Nor was it improper for the district court to base its summary judgment decision granting a permanent injunction "upon collateral estoppel from its prior determination [of liability] in another case, *itself decided on summary judgment.*" Pet. 2-3 (footnote omitted).[7] There is nothing unsual about a case where the facts supporting a finding of liability also support the issuance of injunctive relief; if there is no genuine issue of material fact, summary judgment is appropriate for both dispositions, whether decided in one proceeding or two. See *Moore's Federal Practice*, *supra*, ¶ 56.17[52], at 56-591 to 56-599 (if conditions for collateral estoppel apply, the principle may be invoked in a summary judgment proceeding). Here, petitioners can hardly complain about collateral estoppel: they had a full and fair opportunity in *Lowen* to litigate their ERISA liability, but failed to offer even "a colorable argument that these investments were permissible," 829 F.2d at 1214; the liability issue was actually decided and was necessary to the earlier decision; and the suits by the trustees and the Secretary challenged the same prohibited transactions.[8]

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fall within the rule. In addition, the obligation to issue findings of fact does not entail an obligation to hold a hearing.

[7] Petitioners inaccurately suggest (Pet. 2) that the decision was based "solely" upon the collateral estoppel effect of the earlier *Lowen* decision. The district court stated that it fully considered the additional material that petitioners presented in their papers in this case. Pet. App. 36a-37a, 39a.

[8] Petitioners' due process argument (Pet. 18-22) is tantamount to the nonsensical assertion that a summary judgment proceeding does not comply with the requirements of due process. See *Willner* v. *Committee on Character*, 373 U.S. 96, 107 (1963) (Goldberg, J., concurring) (due process requires

2. Petitioners' additional argument (Pet. 8-13) that the district court erred by granting a permanent injunction based on past violations alone, without consideration of the likelihood of recurrence, also misconstrues the record and the law. ERISA imposes the highest standards derived from the law of trusts on fiduciaries of employee benefit plans. *Donovan* v. *Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982). These standards "must be enforced with 'uncompromising rigidity.'" *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981). Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), authorizes the Secretary of Labor to seek broad equitable relief, and Section 409(a), 29 U.S.C. 1109(a), specifies that in addition to monetary restitution, a breaching fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." See *Brock* v. *Robbins*, 830 F.2d 640, 647

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notice of evidence and a chance to rebut, but not necessarily the right to confrontation and cross-examination). We do not concede that "the prohibition of future employment in the pension industry and the immense stigma attached to the injunctions in the case at bar" (Pet. 21) necessarily implicate a cognizable property or liberty interest. But assuming they do, petitioners were given ample pre-deprivation "notice and an opportunity to be heard." *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 573 (1972). That opportunity took the form of pleadings, interrogatories, depositions, affidavits, and oral argument before the district court. Had they presented genuine issues as to any material fact bearing on the need for a permanent injunction, petitioners would have been afforded the additional opportunty of an evidentiary hearing. Because they did not, the injunction was granted on summary judgment. For the reasons already stated, that was entirely appropriate. In short, the court afforded petitioners all the process they were due.

(7th Cir. 1987). Congress clearly intended to provide the Secretary with the "full range of * * * equitable remedies," including removal of fiduciaries for "repeated or substantial violations" and injunctions to prevent future violations. H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973); S. Rep. No. 383, 93d Cong., 1st Sess. 106 (1973); see *Marshall* v. *Snyder*, 572 F.2d 894, 901 (2d Cir. 1978). There is, accordingly, ample authority in ERISA for the issuance of permanent injunctions against fiduciaries who have breached their duty of complete and undivided loyalty to the plan beneficiaries.[9]

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[9] Pursuant to Sections 409(a), 502(a)(2), and 502(a)(5), the lower federal courts have granted such permanent injunctions on numerous occasions. See *Brock* v. *Robbins*, 830 F.2d at 648; *Whitfield* v. *Tomasso*, 682 F. Supp. 1287, 1306 (E.D.N.Y. 1988); *Brock* v. *Crapanzano*, No. 84-1899 (S.D. Fla. July 23, 1986), aff'd, 819 F.2d 1148 (11th Cir. 1987) (Table), cert. denied, 484 U.S. 1005 (1988); *Donovan* v. *Bryans*, 566 F. Supp. 1258, 1268 (E.D. Pa. 1983); *Marshall* v. *Mercer*, 4 Employee Benefits Cas. (BNA) 1523, 1536 (N.D. Tex. May 27, 1983), rev'd on other grounds, 747 F.2d 304 (5th Cir. 1984); *Donovan* v. *Williams*, 4 Employee Benefits Cas. (BNA) 1237 (N.D. Ohio Feb. 2, 1983); *Marshall* v. *Carroll*, 2 Employee Benefits Cas. (BNA) 2491 (N.D. Cal. Apr. 18, 1980), aff'd, 673 F.2d 1337 (9th Cir. 1982) (Table); cf. *Freund* v. *Marshall & Isley Bank*, 485 F. Supp. 629, 644 (W.D. Wis. 1979) (removal); *Marshall* v. *Kelly*, 465 F. Supp. 341, 354 (W.D. Okla. 1973) (same). Under the common law of trusts, fiduciaries may be removed to protect the interests of beneficiaries and the assets of the trust if they have (1) committed a serious breach of their duties, see Restatement (Second) of Trusts §§ 107, 199, comment e (1959); (2) committed a breach resulting in serious losses, see G. Bogert & G. Bogert, *Trustss & Trustees* § 527, at 72 (2d rev. ed. 1978); (3) demonstrated that they are unfit to serve trust beneficiaries, see 2 W. Fratcher, *Scott on Trusts* § 107, at 107-108 (4th ed. 1987); or (4) engaged in self-dealing, see G. Bogert,

A permanent injunction was clearly warranted in this case. Petitioners were responsible for more than 100 violations of ERISA during a two and one-half year period. Moreover, their breaches involved blatant self-dealing and imprudent investments costing the Plans tens of millions of dollars. As the appeals court concluded (Pet. App. 46a-47a), "[t]he violations of ERISA * * * were neither technical nor isolated. [Petitioners] had done precisely what the statute expressly forbids and in a massive way." Moreover, petitioners appeared before the court "without remorse [and] with a kitbag of transparent excuses." *Id.* at 45a. There was therefore more than enough justification for the court's holding that "serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction," and for the court's unwillingness to await "concrete proof of future wrongdoing" or allow "ERISA fiduciaries and their associates * * * to loot a second pension plan before an injunction may be issued." *Id.* at 46a.[10]

Even if a reasonable likelihood of future violations were always a prerequisite to the issuance of a permanent injunction, such likelihood is "frequently established by inferences drawn from past conduct." *United States* v. *Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). The Second Circuit securities cases that petitioners cite (see Pet.

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supra, § 527 at 75, such as the taking of excessive and unauthorized compensation, *see id.* at 82.

[10] Moreover, the district court considered petitioners' representations that they had no "present intention of offering fiduciary services" in the future and found them to be unconvincing. Pet. App. 37a; see note 4, *supra*. Indeed, the court explicitly stated, "I think there is a likelihood of repetition." Pet. App. 37a.

10-13) are consistent with this principle. Indeed, the court of appeals expressly relied on its precedent that "a permanent injunction may be warranted based on the nature of defendants' violations of the securities laws." Pet. App. 46a, citing *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972); see also *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("the commission of past illegal conduct is highly suggestive of the likelihood of future violations"). There are numerous cases approving such injunctions despite the discontinuance of the violations and assurances of future compliance. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47-48 (1960); *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978); *SEC* v. *Universal Major Indus. Corp.*, 546 F.2d 1044, 1048 (2d Cir. 1976), cert. denied, 434 U.S. 834 (1977).[12]

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[11] Petitioners' reliance (Pet. 8-10) on *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), and *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953), is inapposite. Those cases simply stand for the proposition that a statutory authorization of permanent injunctive relief must be read in light of traditional equitable practice, and that a court sitting in equity is granted the flexibility to decide whether such a remedy is necessary or appropriate. In upholding the permanent injunction in this case, the court below applied that teaching to the circumstances before it.

[12] In the ERISA context, at least two appellate courts have upheld the propriety of prospective injunctions on facts generally less compelling than those presented here. See *Brock* v. *Robbins*, 830 F.2d at 648 (injunctive relief may be appropriate against imprudent trustees even though there was no loss to the plans and the trustees "may not have been driven by sinister motives"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1461 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (voluntary cessation of alleged violations did not moot the case because the possibility of an injunction barring future

Similarly, petitioners incorrectly argue (see Pet. 13-18) that the lower courts overlooked other equitable considerations that they proffered as mitigating factors, particularly petitioners' alleged reliance on advice of counsel.[13] At the hearing preceding the grant of summary judgment in this proceeding, the district court observed that it had "carefully considered that argument in [their] papers [and] determined that the findings have already been made here and are res adjudicata with respect to the fiduciary violations that took place." Pet. App. 36a.[14] The court of

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service as fiduciaries under other plans remained). See also cases cited in note 9, *supra*.

[13] As noted by petitioner (Pet. 14-15), this argument was presented in the district court principally through the affidavit of counsel to petitioners. On its face, the affidavit was deficient in two respects. It was not based on personal knowledge of the transactions and events giving rise to their liability, as required by Fed. R. Civ. P. 56(e), and, even if accepted as true, it did not explain most of the violations for which petitioners were found liable. Petitioners also presented deposition testimony and a counterstatement alleging material facts in dispute. Their repeated invocation of their Fifth Amendment privilege, however, did not give the court any reason to accept their selective recitation of the facts or to deny the motion for summary judgment in order to take additional evidence on matters that, given the nature of their liability, were at best peripheral to the issue of appropriate relief.

[14] Petitioners additionally complain (Pet. 14-15) that the court gave no consideration to the effect a permanent injunction would have on their professional reputations and legitimate business activities. But the finding of liability in *Lowen* already produced that collateral effect. In any event, in fashioning injunctive relief a court must give priority to protecting the public interest, not the wrongdoers' private interests. See, *e.g.*, *SEC* v. *Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). Nor is a lifetime bar from ERISA-related activities dispro-

appeals characterized these same arguments as "transparent excuses and frivolous legal contentions." *Id.* at App. 45a. The courts below can hardly be faulted for giving them little or no weight.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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portionate considering that petitioners had participated in ERISA violations "in a massive way." Pet. App. 47a. The comparison to the 13-year statutory bar for persons convicted of enumerated crimes (Pet. 18) is inapt. See 29 U.S.C. 1111. That bar is mandated whether or not the crime was committed in connection with the fiduciary's ERISA duties, and does not preclude a court from issuing an injunction for a longer period in the exercise of its equitable discretion.

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